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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1990

THE STATE OF TEXAS,
Petitioner,

v.

TIMOTHY LANE GRIBBLE.
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether character and background evidence attains constitutionally mitigating value, under the Eighth Amendment, merely by its proffer, irrespective of its relevance to constitutionally recognized sentencing concerns of culpability and capacity for rehabilitation?

2. Whether the deliberateness inquiry of the first statutory punishment issue, supplemented by Gribble's requested instruction and definition of the term "deliberately," provided a constitutionally adequate vehicle, under the Eighth Amendment, by which the mitigating force, if any, of Gribble's proffered mental status evidence could result in a sentence less than death?

3. Whether, under the Eighth Amendment, character and background evidence is constitutionally probative of the defendant's personal culpability if the commission of the offense is neither intuitively nor demonstrably attributable to that evidence?

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Petitioner[1] herein, by and through the Attorney General of Texas, and files this Petition for Writ of Certiorari to review the judgment of the Texas Court of Criminal Appeals entered in this case on November 14, 1990, with rehearing denied on February 20, 1991.

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[1] For clarity, the petitioner will be referred to as "the state," and Respondent will be referred to as "Gribble."

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals reversing Gribble's conviction and sentence is attached to the petition as Appendix A. The Court of Criminal Appeals' denial of the state's motion for rehearing is attached as Appendix B.

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was entered on November 14, 1990. A timely filed motion for rehearing was denied on February 20, 1991. The petition for writ of certiorari is filed within ninety days after final judgment in this case, and this Court's jurisdiction is invoked under the provisions of 28 U.S.C. § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, amend. VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, amend. XIV, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991):

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:
(1) whether the conduct of defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

Gribble was indicted on October 14, 1987, in the 10th Judicial District Court of Galveston County, Texas, for the capital offense of murder of Elizabeth Jones while in the course of committing and attempting to commit the offense of kidnapping. Gribble was tried before a jury upon a plea of not guilty, and on October 24, 1988, the jury found him guilty of the capital offense. On October 27, 1988, following a separate punishment hearing, the jury answered affirmatively the two special sentencing issues submitted pursuant to TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1991). In accordance with state law, the trial court assessed Gribble's punishment at death.

Gribble appealed his conviction and sentence to the Texas Court of Criminal Appeals, which on November 14, 1990, reversed the conviction and sentence upon a finding of federal constitutional error at the punishment phase of

the trial (App. A). The court denied rehearing on February 20, 1991 (App. B).

B. Statement of Facts

1. Guilt-Innocence Phase

The facts pertaining to Gribble's commission of the murder are set forth in the opinion of the court below (App. A 3-6).

2. State's Punishment Phase Evidence

At the punishment phase, the state introduced evidence relevant to the future dangerousness inquiry of Texas' second sentencing issue. The jury was apprised of, among other things, Gribble's past use of illegal drugs and his history of sexual assaults.

At 2:30 a.m. on November 30, 1980, Officer Clay Kennelly investigated an occupied vehicle parked at the far back of Gribble's family's Mobil station. When the occupant, Gribble, rolled down the car window, Kennelly smelled burning marijuana (R VI 1062).[2] Kennelly also observed a weapon fashioned from a timing chain lying on the front floor board (R VI 1062-63). Similarly, at 3 a.m. on October 24, 1981, Officer Chet Rich stopped Gribble for speeding and smelled burning marijuana (R VI 1068). A subsequent search of Gribble's vehicle revealed that he had 10 Mandrex tablets underneath the passenger seat (R VI 1069).

Additionally, in January, 1981, Gribble burglarized his father's mobile home, which was parked behind the family's service station (R VI 1074, 1083-85). Although he

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[2] "R" refers to the appellate record filed in this case and is followed by the referenced volume and page number. "Tr" refers to the trial transcript.

initially informed police that he bought his father's television set and gun from Johnny Garcia (R VI 1079; state's exhibit 98), he later admitted to entering his father's mobile home and stealing an M-1 rifle, a television and an AM/FM radio (R VI 1084; state's exhibit 99).

The state introduced evidence of three prior sexual assaults committed by Gribble, two of which had resulted in convictions at the time of Gribble's trial for capital murder. The first assault was on Kristine Odom. Between 3 and 4 a.m. on April 10, 1981, Gribble, who was a friend of Kristine Odom's daughter, Tracy, knocked on Odom's door and told her that Tracy had been in an automobile accident as a ruse to gain entrance (R V 957). Kristine Odom opened the door and told him to have a seat while she got dressed (R V 959). When she went to her closet, Gribble came up behind her, tore her night gown off her body, and, despite her pleas not to hurt her, raped her three times (R V 960-63). Afterwards, he told her to lay with him for a while, and he put his arm across her chest "like a guard" (R V 964). In a statement made following his arrest for the assault on Odom (R V 1002-06; state exhibit 96), Gribble related that he had been drinking "pretty heavily," smoked four marijuana cigarettes, and took two Mandrex tablets before the attack on Odom (R V 1003). Gribble pled guilty to false imprisonment and received a five-year probated sentence (R V 1006).

The second sexual assault involved a 15-year-old girl. At approximately 9:30 p.m. on August 12, 1983, Kristina Kelly was walking home from her sister's house when Gribble, a neighborhood friend of her sister, stopped and asked her if she wanted a ride home (R V 933, 936). Instead of taking her home, Gribble pulled his car into an alley, grabbed her by her hair, forced her down onto the seat, and made her perform oral sex on him. After about five minutes, Gribble drove out of the alley but forced Kelly "to stay down in the seat until [she] finished what she was doing" (R V 938-40). He drove to a "plant," where he made

her get out of the car, ripped her blouse off, and tried to "have sex with her from behind" (R V 940). Then she was forced back into the car and taken to another part of the "plants" where he forced her down on her hands and knees and had sex with her again (R V 943). Before driving Kelly home, Gribble "apologized" in an attempt to secure her silence, telling Kelly he had never done anything like that before and did not know why he did it. He then told her that it would not take him long to get out of jail and that, if she told what had happened, he would come back and hurt her (R V 944). This incident led to Gribble's conviction of aggravated rape and aggravated sexual assault. Kelly encountered Gribble again two years later when she was with her boyfriend at a nightclub (R V 947). Gribble's friends told her boyfriend that she was a lying bitch and that she sent him to prison when he wasn't guilty (R V 948).

The victim of the third sexual assault was Gribble's ex-wife. Mary Kate O'Grady, a high school teacher, married Gribble in December, 1982, after knowing him for about six months; they were divorced in August, 1984. She did not learn that Gribble was on probation for the false imprisonment of Odom until after his arrest for the rape of Kristina Kelly (R V 1009-10). O'Grady filed for divorce in March or April of 1984, after Gribble was imprisoned for the rape of Kelly (R V 1013).

Between 7:30 and 7:45 p.m. on September 17, 1987, Gribble appeared at O'Grady's apartment in Webster, Texas, saying that he just wanted to talk (R V 1017). After visiting for a while, he left at 9:15 p.m., stating that he knew she had to get up early for work in the morning (R V 1020). However, he immediately returned, explaining that his truck would not start (R V 1021). After making several telephone calls in apparent attempts to have someone come and get him, Gribble was still at her apartment at 12:30 a.m. (R V 1023-25). At that time, he pushed her down on the couch and lay on top of her, saying "we're going to make love like we used to" (R V 1025). When she tried to scream for

her next door neighbor, he put his hand over her mouth and held her nose shut so that she could not breathe (R V 1026). He told her "[y]ou are going to do it" and forced her to engage in oral sex and intercourse (R V 1028-30). Afterwards, he showered and left (R V 1031).

Finally, Officer Timothy Goetschius of the Texas City Police Department testified that Gribble had a bad reputation for being a peaceful and law abiding citizen (R VI 1113).

3. Gribble's Punishment Phase Evidence

Numerous family members, including Gribble's parents, his brother, sisters, and two cousins, testified at the punishment phase. Their testimony revealed the following: Gribble's mother and father were married in Tennessee, where they lived for six years before moving to Chicago in 1955 (R VI 1136). For the next seven years, Gribble's father worked for the Clinton Paint Company, and the family bought a home during that period (R VI 1136). By the time of Gribble's birth in 1962, his parents were experiencing marital difficulties attributed by his father, James Gribble, to his wife's revealing that she had been unfaithful to him (R VI 1137). According to James Gribble, this revelation led to drinking and infidelity on his part and, ultimately, to his return to Tennessee where, in 1964, he was convicted of a crime and incarcerated for five years (R VI 1140).

During his father's imprisonment, when Gribble was approximately two to six years of age, he lived in Chicago with his mother and siblings (R VI 1184). For the first two or three years of that time, the family lived in the home they owned (R VII 1265). When Gribble's mother, Lavene, had a nervous breakdown shortly after her husband's incarceration, the children remained in Chicago: Sheila and Gribble with their Aunt Mary Maguire and Jim

and Genet with their grandfather (R VI 1182). After a two-month separation, they all lived with their mother until their father was released from prison (R VI 1183, 1232).[3] During the next four years Gribble's mother occasionally worked part-time; otherwise, the family received welfare (R VI 1183; VII 1267). Gribble's mother had nervous breakdowns approximately once a year, and at those times relatives would take care of the children (R VI 1184, 1224-25). Sheila testified that her mother was "not exactly" able to provide the kind of love, attention, and guidance that they needed, but "she did what she could" (R VI 1233). Sheila further observed:

> [Gribble was a] very loving, very emotional child. He needed lots of love, and we got lots of love from supporting relatives, not so much from our parents, our mother. There were lots of relatives that they gave us the kind of love we really didn't get from our parents.

(R VI 1234). Although Genet testified that there was no stable parental figure in Gribble's life from the age of one and a half to five, she further testified that his mother was able to provide normal love and care for Gribble when she was there (R VI 1248).

In 1969, when James Gribble got out of prison, all four children visited him at his mother's house in LaMarque, Texas (R VI 1141). Less than a month later he went to Lavene's parent's house in Missouri to pick up Gribble and his sister, Sheila. Sometime after that, Gribble and Sheila went to live with Lavene and her new husband, Clyde Franks, in Tennessee (R VI 1143).

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[3] In apparent contradiction to Sheila's testimony that they lived with their mother until their father got out of prison, Genet testified that she didn't stay in one place a long time but moved between relatives, grandparents, aunts, and uncles (R VI 1246). One possible explanation for this inconsistency in testimony is that each child's experience was different.

According to Lavene, the move to Tennessee in 1969 reflected the "dream" that she and Franks had "of going, living in the country, and making a garden and all that" (R VII 1269). They lived in a mountainside cabin on land owned by the Franks family that was, apparently euphemistically, referred to as a farm, but was not enough land to support a family (R VII 1269). Franks worked at a service station (R VII 1270), and they bought food with food stamps (R VI 1233). Initially, the cabin lacked running water; but shortly after the move, a water line was installed (R VII 1269; see also VI 1186).

For two months, Gribble and his sister lived with Lavene and Franks in Tennessee. At that time, Gribble's father received a letter from Lavene saying her husband had run off and left them with no food (R VI 1143).[4] James Gribble went to Tennessee and picked up Gribble, Sheila, and Lavene, who was seven months pregnant (R VI 1143). After the birth of her baby, James sent Lavene back to her parent's house in Missouri; the four children, including Gribble, stayed with him in Texas City (R VI 1144).

Gribble started first grade in Texas City in 1969 and lived with his father from that time until he was 14 years old (R VI 1148-49). In 1969 or 1970, his father was hired to manage a Mobil station in Texas City; he began purchasing the station and a house in 1971 (R VI 1146-47). He married Laura Armstrong in 1970; they divorced nine months later and then remarried. Their second marriage lasted a year (R VI 1150). After the second divorce, the children stayed

[4] Although Genet testified that, when they were living in Chicago her mother went out a lot and sometimes brought men home (R VI 1247), the record does not support the conclusion of the court below that the children were left in the mountainside cabin without running water and food while Lavene engaged in such activity.

with their mother in Tennessee for two months and then returned to their father's house (R VI 1151). Immediately after divorcing Laura, in 1974 or 1975, Gribble's father married Jessie, the woman to whom he remained married at the time of Gribble's trial (R VI 1152-53).

When Gribble was 12 years old, he started working evenings and weekends at the Mobil station, taking home $10 per week with the remainder of his earnings being put into an account for him. By the time he was 14, he had saved $1,800 (R VI 1154).

Gribble was 14 years old when he moved to Sommerville, Texas, with his father, who had built a home there to be near his parents (R VI 1155-56). Six months later, Gribble returned to Texas City to live with his brother, Jim; it was at this time that he quit attending school (R VI 1156). Jim, his wife, and Gribble moved to Arkansas, where Gribble lived for a year (R VI 1157). He then returned to Texas City and, until he married Mary Kate, lived with his mother and her husband, Ray Steinbach (R VI 1157-58, 1163).

Gribble's father, James, bought eight acres with two houses on them in Hitchcock so his step-father could live with them in town. In 1982, James began constructing the buildings for his storage business, G & G Enterprises, on this property, and continued to work at the gas station each evening (R VI 1160). Before Gribble married Mary Kate O'Grady in December, 1982, his father fixed up the second house on the property for them to live in (R VI 1164). During their marriage, Gribble assisted his father in the construction of the storage units and worked at the Mobil station (R V 1011). According to O'Grady, Gribble and his brother, Jim, were to inherit the station and the storage business upon his father's retirement (R V 1011).

Following a two-week paid vacation in 1983, Gribble was arrested for the rape of Kristina Kelly (R VI 1164). His

father hired an attorney to represent him, and, during his incarceration, visited him regularly (R VI 1165). When he was released from the Texas Department of Corrections, his father picked him up, and he returned to the family businesses (R VI 1167).

When Gribble's brother opened a car lot in Hitchcock, his father made a $3,800 investment in the business for himself and invested the same amount for Gribble. In addition to his salary of $325 per week, Gribble's father paid him a bonus of $500 per month to be saved toward the car lot (R VI 1167). When Gribble and his second wife, Tammi, did not take care of the portions of the family enterprises for which they were responsible, Gribble's father decided it would be appropriate to give them a bigger stake in the businesses and sold them, on credit, a Mexican import business, a portable sign business and half of a U-Haul business (R VI 1170). According to his father, Gribble and Tammi bought things on his credit without his permission and, generally, "thought it was all right to do anything they wanted to do" (R VI 1173).

William Winslade, a psychoanalyst, testified on Gribble's behalf. Winslade's evaluation of Gribble was based on five and one-half hours of interviews conducted at the jail after the initiation of jury selection (R VII 1298). Winslade stated at the beginning of his testimony that the words he used to describe Gribble were those used by Gribble himself (R VII 1301). He testified that Gribble's sexual violence was attributable to an inability to control his sexual fantasies, particularly when drinking and taking drugs (R VII 1309, 1313, 1318, 1349). Gribble told Winslade that he feared being dominated by women and that he fantasized about women forcing him to perform oral sex (R VII 1299, 1302). Gribble also advised Winslade that on two occasions, once when he was four or five years-old and once when he was six or seven, his mother had forced his head

down "between her genitals" (R VII 1306-07).[5] Winslade consulted a former colleague, an expert on sexual disorders, who opined that these experiences, even if they were untrue fantasies, provided a possible explanation for Gribble's sexual violence (R VII 1307). It was Winslade's "guess," one that he could not "be real confident about, . . . that underneath the sexual fantasies and the fear is a serious mental illness" (R VII 1314), but he found no evidence of mental illness (R VII 1317). The only characteristic that Winslade positively attributed to Gribble was an inability to control his fantasies, thoughts, and fears that led to his committing violent sexual acts against women (R VII 1349).[6] Winslade testified that at these times Gribble's free will was diminished (R VII 1353).

Dr. Winslade acknowledged that, in 1983, Gribble had been evaluated by a Dr. Cole. Cole's evaluation was based on a clinical interview as well as the results of the Wechsler Clear Adult Intelligence Scale, Rorschach Ink

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[5] Gribble's mother read into evidence a letter she allegedly wrote to Gribble's wife, Tammi, shortly after his arrest for the capital offer se. In that letter, she wrote,

> Tell [Gribble] that if there is any secrets he is keeping about being molested as a little boy by anyone in the family, please tell it. Don't let secrets destroy your life. He may already have, but he can't be loyal unto someone until he knows why.

(R VII 1286). However, she did not testify that she or anyone else had molested Gribble. Further, Gribble's former wife, Mary Kate O'Grady testified that Gribble never told her that he had been abused as a child and that his relationship with his mother was good (R V 1012).

[6] Dr. Seth Silverman testified at the guilt-innocence phase that Gribble did not have a conscious awareness that he was killing Jones by tying the ligature around her neck and securing it with a square knot (R IV 769). He attributed this ability to act without conscious awareness to psychotic illness, a long history of sexual conflicts, and difficulty controlling impulses, which cause him to act in an "automated" fashion (R IV 790).

Blot, Bender Gestault, sentence completion, word association and Minnesota Multiphasic Personality Inventory tests (R VII 1335). Cole found no compulsion to engage in sexual activity and no accompanying aberrant erotic imagery. He viewed Gribble's two previous assaults on Kristina Kelly and Kristine Odom as reflecting poor judgment (R VII 1337). Cole further found that Gribble had a verbal I.Q. of 102 and a performance I.Q. of 107.[7]

On rebuttal, David Wayne Dunn testified that when he was in the holding tank with Gribble, Gribble exclaimed to him, "Damn my old lady, I should have killed that bitch" (R VII 1384).[8]

4. Supplemental Punishment Phase Instructions Submitted to Jury

At the close of the punishment phase, Gribble requested eight special instructions to assist the jury's consideration of mitigating evidence (App. C; R VII 1414-21). In response, the court modified the jury charge to include language substantially the same as Gribble's first requested instruction:

> In making these decisions, you are instructed that you can consider any evidence which, in your opinion, mitigates against an answer of "yes" to each issue, including any aspects of

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[7] Although the prosecutor inquired in cross-examination whether Gribble was aware that he was facing a death penalty and whether his responses were attributable to that awareness, the trial court did not allow the state to cross-examine Winslade regarding the fact that two psychiatrists, who examined Gribble to determine competency, had found him to be malingering a mental illness (Tr 194; R VII 1326-29).

[8] The court instructed Dunn not to include in his testimony the remainder of Gribble's statement—that he should have killed his wife because she told the authorities of the location of another body (R VII 1364).

> the defendant's character, history or mental illness, if any, and any of the circumstances of the commission of this offense which you find to be mitigating. And if such evidence causes you to have a reasonable doubt as to any issue, you are required to answer that issue "no."

(Tr III 223; R VII 1421). The trial court further instructed the jury:

> In answering [the first issue] "deliberate" means something more than intentional and something less than premeditated, and is a conscious decision involving a thought process which embraces more than mere will to engage in the conduct."

(Tr III 223-24). Although Gribble objected to the trial court's failure to define the terms "probability," "criminal acts of violence," and "continuing threat to society" in the punishment phase charge, he neither objected to the included definition of "deliberate" nor requested an alternative definition (R VII 1415).[9] That the trial judge gave these instructions is not mentioned in the opinion of the court below.

5. Gribble's Punishment Phase Argument

Gribble's counsel argued at the punishment phase that, in determining punishment, it was important for the jury to consider not only what Gribble did but also why he

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[9] In his motion to quash the indictment, Gribble alleged that the capital sentencing statute is unconstitutional because it does not include a definition of the term "deliberately" which distinguishes the determination of the first punishment issue from the finding of intent at the guilt-innocence phase (Tr II 130-32).

did it (R VII 1438). Counsel reminded the jury of the testimony of witnesses who characterized Gribble as "likeable, polite, courteous, friendly, dependable, prompt, hard working . . . good with animals, . . . good with his stepchildren" (R VII 1441). Counsel acknowledged that Gribble also had a "bad side" that made him commit "heinous crimes" (R VII 1447-48) and argued that this bad side was attributable to a lack of nurturing (R VII 1448-1453).[10] Counsel urged the jury to conclude that Gribble's background, emotional deprivation, and the possibility of abuse from his mother resulted in an emotionally disturbed human being (R VII 1454). Counsel noted that the supplemental mitigation instruction authorized jurors to consider any aspects of the defendant's character, history or mental illness, if any, and any of the circumstances of the offense that they found to be mitigating (R VII 1458). Counsel then told them how to give effect to such evidence if they felt that it called for a sentence less than death:

> Let's assume you don't feel like the death penalty is appropriate under these circumstances, due to his mental illness, due to what you have heard about him as a human being as a whole.
>
> How do you translate that in terms of this verdict form? . . .
>
> But I will submit to you . . . [t]hat you could consider if a person in forming these especially deliberate acts is responding, if that is a symptom of a mental illness, if that person is responding to an impetus, . . . to

[10] Counsel not only asked the jury to consider the alleged lack of nurturing of Gribble in his early childhood, he also asked the jury to consider the fact that Gribble's father worked long hours and that, when his father married Laura Armstrong, Gribble had to move into a new home that could also accommodate her children (R VII 1453).

> something inside himself over which he has no control. . . .
>
> I submit you can be consistent, if you feel like the death penalty is not appropriate for this individual, that you can affect that opinion by saying, "No, I do not feel like it was done in a deliberate fashion."
>
> And I will further submit to you that . . . deliberate can mean many things. We told you it can mean anything you make it mean, and the Judge gave you guidance, more than intentional and something less than premeditated, and is a conscious decision involving a thought process which embraces more than mere will to engage in the conduct. . . .
>
> I submit to you it's entirely consistent and honest on your part, if you feel the heinous crimes resulted from that mental illness, if you think it's there, and those are symptoms of the disease, that it's entirely consistent, and honest to, therefore, say, "No, he did not do it deliberately," because deliberately is what it means to you.

(R VII 1459-1462).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS TO GRANT THE WRIT.

Despite the fact that the statutory punishment issues, supplemented by Gribble's requested instruction, constituted a viable vehicle by which the jury could give

effect to all proffered mitigating aspects of his background and character evidence, the Court of Criminal Appeals found that, under the rule of *Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934 (1989), Gribble was entitled to issues beyond the statutory special issues. Contrary to the conclusion of the court below, the trial court's failure to give additional jury instructions in Gribble's case did not implicate the Eighth Amendment concerns at issue in *Penry*. Moreover, the finding of Eighth Amendment error by the court below is inconsistent with the holdings in *Saffle v. Parks*, 494 U.S. ___, 110 S.Ct. 1257 (1990), and *Boyde v. California*, 494 U.S. ___, 110 S.Ct. 1190 (1990).

Further, the decision below demonstrates the need for this Court to resolve confusion engendered by *Penry*. Specifically, following *Penry*, there is a need to reconcile the decisions of this Court that identify constitutionally recognized sentencing concerns, *California v. Brown*, 479 U.S. 538, 545 (1987) (personal culpability); *Penry v. Lynaugh* (same); *Skipper v. South Carolina*, 476 U.S. 1, 7 n.2 (1986) (capacity for rehabilitation or future dangerousness), and the decisions that identify classes of potentially mitigating evidence. *Woodson v. California*, 428 U.S. 280 (1976) (character, record, circumstances of the offense); *Lockett v. Ohio* 438 U.S. 536, 604 (1978) (same); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (character, background, circumstances of the offense). Without distinguishing between these two lines of cases, the court below erroneously accorded mitigating value to proffered evidence independent of its relevance to the constitutionally recognized sentencing concerns. Thus, under that court's reasoning, background and character evidence that is neither intuitively nor demonstrably probative of a reduced culpability for the capital murder attains constitutionally mitigating value merely by its proffer, even if that proffer is made solely to engender sympathy. Carried to its logical conclusion, this concept of mitigating evidence would permit the jury to base a sentence less than death on any proffered character or background evidence, including, for example, occupation or even race.

The decisions identifying constitutionally recognized sentencing concerns and the decisions that identify classes of potentially mitigating evidence can be reconciled: while a defendant is entitled to proffer any character or background evidence for its relevance to valid sentencing concerns, the Eighth Amendment is violated only if evidence that is probative of a reduced personal culpability or a capacity for rehabilitation cannot result in a sentence less than death. Further, this concept of mitigation, while consistent with the Court's precedent, would substantially resolve the tension inherent between the line of cases requiring sentencing procedures that constrain and guide sentencing discretion to reduce arbitrary and capricious assessment of death sentences and the line of cases limiting the states' discretion to channel the sentencer's consideration of mitigating evidence. *See Walton v. Arizona*, 497 U.S. ___, ___, 110 S.Ct. 3047, 3058-68 (1990) (Scalia, J., concurring in judgment).

In *Lockett v. Ohio*, the Court identified relevant mitigating evidence as "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." In *Saffle v. Parks*, 494 U.S. at ___, 110 S.Ct. at 1262, however, the Court made it clear that, where states such as Texas choose to guide a capital jury's sentencing discretion through issues incorporating constitutionally recognized sentencing concerns, the Eighth Amendment is not violated by the narrowness of the issues unless the jury is unable to give effect to a proffered and constitutionally recognized value of mitigating evidence. The conclusion that the Eighth Amendment is not violated by the failure to provide a vehicle for jury consideration of evidence that is irrelevant to a constitutionally recognized sentencing concern follows from *Saffle v. Parks* and *California v. Brown*, where the Court held that the Eighth Amendment is not violated by the failure to provide a vehicle for the jury to act solely on the basis of sympathy. *See Saffle v. Parks*, 494 U.S. at ___, 110 S.Ct. at 1262; *see also Skipper v. South*

Carolina, 476 U.S. at 7 n.2 (not all aspects of a defendant's character must be treated as relevant and potentially mitigating).

The Court has identified two specific, underlying sentencing concerns, a capital defendant's personal culpability and his potential for rehabilitation, and has found evidence to be constitutionally mitigating when it is relevant to these concerns. *See Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2947 (underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to personal culpability of defendant); *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring) (same); *California v. Brown*, 479 U.S. at 545 (same); *Skipper v. South Carolina*, 476 U.S. at 5 (past conduct as indicative of probable future conduct is inevitable element of criminal sentencing, and evidence that defendant would not pose a future danger if spared a death sentence must be considered potentially mitigating). Where the sentencing decision can be based on evidence that is irrelevant to a defendant's personal culpability for the crime or his capacity for rehabilitation, there is a substantial risk that the sentence may reflect the jurors' emotional sensitivities or sympathy rather than a reasoned moral response. Thus, *Skipper v. South Carolina*, *California v. Brown*, and *Saffle v. Parks* demonstrate that character and background evidence is not *per se* mitigating, but only attains constitutionally mitigating value as a consequence of, and to the extent it is relevant to, a valid sentencing concern. The erroneous interpretation of the court below fails to recognize the limits of constitutional relevance. This Court should grant certiorari to clarify this sensitive area of its Eighth Amendment jurisprudence and thereby adequately guide the state and lower federal courts.

II.

THE FIRST PUNISHMENT PHASE ISSUE PROVIDED A CONSTITUTIONALLY ADEQUATE VEHICLE FOR THE JURY TO GIVE EFFECT TO THE MITIGATING VALUE, IF ANY, OF GRIBBLE'S MENTAL STATUS EVIDENCE, WHERE THE ONLY CHARACTERISTIC POSITIVELY ATTRIBUTED TO GRIBBLE WAS AN INABILITY TO CONTROL HIS IMPULSES OR SEXUAL FANTASIES.

The decision of the court below was based in part on the erroneous premise that the testimony of Gribble's psychoanalyst, Dr. Winslade, was constitutionally mitigating evidence probative of a reduced personal culpability for the capital murder. Justice O'Connor's concurring opinion in *California v. Brown* makes it clear that two conditions must be met for character or background evidence to attain constitutional mitigating value relevant to a defendant's culpability: first, the evidence must pertain to an aspect of a defendant's character or background that society views as rendering him less culpable for the crime, and, second, there must be a nexus, or degree of attribution, between the proffered evidence and the commission of the offense.[11]

> "[E]vidence about the defendant's background and character is relevant because of the **belief, long held by this society**, that

[11] Character and background evidence unrelated to the commission of the offense may also attain constitutional relevance by demonstrating that the criminal conduct was an aberration from otherwise good character. *See Boyde v. California*, 494 U.S. at ___, 110 S.Ct. at 1199 (defendant's dancing ability extenuated gravity of crime by demonstrating that criminal conduct was aberration from otherwise good character). Under the Texas capital sentencing scheme, the mitigating value of such good character evidence is fully subsumed within the future dangerousness inquiry of the second punishment issue.

> defendants who commit criminal acts that are **attributable** to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. . . . Thus, the sentence imposed at the penalty stage should reflect a reasoned **moral** response to the defendant's background, character, and crime rather than mere sympathy or emotion."

Franklin v. Lynaugh, 487 U.S. at 184 (O'Connor, J., concurring), *quoting California v. Brown*, 479 U.S. at 545 (O'Connor, J., concurring) (first and second emphases added); *see also Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2947.

The only characteristic positively attributed by Dr. Winslade to Gribble was an inability to control his fantasies, thoughts, and fears, which led to his committing violent sexual acts against women (R VII 1349). While Winslade "guessed" that Gribble might have an underlying mental illness, he stated that he had no evidence of that (R VII 1314, 1317). However, Gribble's confession reveals that the murder was separated from the rape by a significant period of time and that he murdered Jones to avoid prosecution for rape and not because of an uncontrollable sexual urge (App. A 5-6). There is no support for the conclusion, which necessarily underlies the decision of the court below, that society views uncontrollable sexual fantasies, in the absence of affirmative evidence of extensive, underlying mental disabilities or illnesses, as reducing a person's culpability for violent sexual acts, much less a murder not committed in temporal proximity to a violent sexual act. The Eighth Amendment is not violated by the omission of an instruction that would allow the jury to give mitigating effect to a witness's unsubstantiated and unsupportable speculation to that effect.

In its analysis of mitigating evidence, the court below did not address Dr. Silverman's guilt-innocence phase testimony that a psychotic illness, history of sexual conflicts and difficulty controlling impulses caused Gribble to act in an "automated" fashion, without conscious awareness and that, although the sexual act and other acts which preceded the murder were intentional, Gribble did not intend to kill the victim, Ms. Jones (R IV 769-87). However, in finding Gribble guilty, the jury necessarily rejected Dr. Silverman's testimony. Thus, in the context of the punishment phase deliberations, Dr. Silverman's testimony raises only the issue of residual doubt. Residual doubt regarding an element of the offense is not a constitutionally mandated sentencing factor. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2948; *Franklin v. Lynaugh*, 487 U.S. at 173 (plurality opinion); *Id.* at 187 (O'Connor, J., concurring).

Further, even if Dr. Winslade's and Dr. Silverman's testimony were probative of Gribble's culpability for the murder, additional punishment phase issues or instructions were not required to facilitate the jury's consideration of the evidence or for the jury to give it mitigating effect. The Eighth Amendment only requires an additional instruction or issue where the defendant offers evidence of his personal culpability that has relevance beyond the deliberateness inquiry of the first statutory issue and where there is no other viable means by which the jury could give mitigating effect to his evidence. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2949.

Dr. Silverman's and Dr. Winslade's testimony could be fully and effectively considered within the scope of the first issue—whether the conduct of defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result. Unlike Penry's evidence of mental retardation, Gribble's evidence was not a two-edged sword, which diminished his blameworthiness for the crime in a manner that could not be reflected in the

jury's response to the first punishment issue while supporting an affirmative response to the second issue by indicating that there was a probability of future violent criminal conduct. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 2949. The evidence encompassed by Dr. Silverman's testimony is significantly different from the evidence that concerned the Court in *Penry*.

Penry proffered evidence that, because he was mentally retarded, he was generally less able than a normal adult to control his impulses or to evaluate the consequences of his conduct; yet because of the irreversible nature of his mental retardation, he, through no fault of his own, could never learn from his mistakes.[12] The Court recognized that Penry's evidence "was relevant to whether he acted deliberately, but it also had relevance to his moral culpability beyond the scope of the issues." Because evidence of an inability to control impulses directly relates to the capacity for deliberate behavior, it clearly was Penry's inability to learn from experience that exceeded the scope of the first issue. Moreover, it was precisely this latter aspect of his mental retardation that was viewed by the Court as dual-edged, because it indicated future dangerousness and, thus, was relevant to the second statutory special issue only as an aggravating factor. *Penry v. Lynaugh*, 492 U.S. at ___, 109 S.Ct. at 1949. In contrast, Gribble's evidence did not indicate a general inability to evaluate the consequences of his conduct and formulate alternative behaviors, *i.e.*, to learn from his mistakes. Gribble's evidence of uncontrollable sexual impulses and automated behavior, if credited, was clearly single-faceted and, unlike Penry's evidence, did not reflect a disability outside the scope of the first issue.

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[12] Gribble's I.Q. of 102 to 107 (R VII 36) is in the average range of intelligence, while Penry's I.Q. of 50 to 63 showed him to be mildly to moderately retarded.

As defense counsel argued at the punishment phase, the jury could give mitigating effect to Gribble's evidence of uncontrollable fantasies and lack of free will in responding to the first punishment phase issue. The first issue was supplemented by an instruction that directed the jury to consider evidence of his character, history, or mental illness in responding to the punishment phase issues. "Deliberate" was defined for the purposes of the first punishment issue as "something more than intentional and something less than premeditated, [. . .] a concious decision involving a thought process which embraces more than mere will to engage in the conduct" (Tr III 223-24). Further, there was nothing in the prosecutor's closing argument that undermined the viability of the first issue as a vehicle to consider and reflect mitigating aspects of Dr. Winslade's or Dr. Silverman's testimony. The prosecutor merely countered that Gribble did not lose control (R VII 1469). He responded to Dr. Winslade's testimony that Gribble's sexual violence was attributable to uncontrollable sexual fantasies and that he usually felt remorse for such violence by noting that, within two hours of when Gribble murdered Libby Jones, he was joking with fellow workers at her home (R VII 1469-70). Gribble does not demonstrate a reasonable likelihood that the jurors interpreted the first statutory punishment phase issue, as supplemented, in a manner that precluded consideration of relevant mitigating evidence and, thus, does not establish an Eighth Amendment violation. *See Boyde v. California*, 494 U.S. at ___, 110 S.Ct. at 1198 (in order to establish an Eighth Amendment violation, a defendant must demonstrate a "reasonable likelihood" that jurors applied a challenged instruction in a manner that precluded consideration of relevant mitigating evidence).[13]

Where, as occurred here, the jury is able to consider and give effect to the mitigating force of the proffered

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[13] Indeed, the court below does not even purport to utilize the correct constitutional standard for analyzing the adequacy of jury instructions set forth in *Boyde*.

evidence within the context of one of the statutory inquiries, the failure to provide additional instructions or vehicles by which the jury can consider and give effect to that evidence does not violate the Eighth Amendment. *See Boyde v. California*, 494 U.S. at ___ n.5, 110 S.Ct. at 1199 n.5; *Penry v. Lynaugh*, 497 U.S. at ___, 109 S.Ct. at 2948 (no Eighth Amendment violation in *Franklin* because jury able to give effect to the mitigating force of evidence). There is nothing in Dr. Winslade's or Dr. Silverman's testimony from which a rational juror could conclude that Gribble's mental state reduced his culpability in any manner other than a loss of self control. *See Brock v. McCotter*, 781 F.2d 1152, 1158 (5th Cir.) (no error where juror would not consider defendant's age of 25 as mitigating where no rational juror would find such an age mitigating), *cert. denied*, 476 U.S. 1153 (1986). The Eighth Amendment does not mandate that a jury be able to respond to every manner in which a defendant wishes to characterize his evidence as mitigating, but merely requires that the jury have an adequate vehicle by which the mitigating force of the evidence can result in a sentence less than death. Gribble's jury clearly had such a vehicle. The jury's failure to answer the first punishment issue "no" reflects only that his evidence did not raise a reasonable doubt as to whether the murder was committed with "more than mere will to engage in the conduct."

III.

BY REQUIRING THE TRIAL COURT TO GIVE AN INSTRUCTION THAT ALLOWS THE JURY TO GIVE MITIGATING WEIGHT TO BACKGROUND EVIDENCE THAT IS NOT PROBATIVE OF EITHER GRIBBLE'S PERSONAL CULPABILITY FOR THE MURDER OR HIS CAPACITY FOR REHABILITATION, THE COURT BELOW IMPERMISSIBLY PRESCRIBED

A PROCEDURE UNDER WHICH SENTENCES ARE BASED ON EMOTION AND SYMPATHY.

The court below also based its grant of relief on the jury's alleged inability to give mitigating effect to what the court characterized as a troubled and insecure childhood produced by Gribble's father being imprisoned, his mother being institutionalized for severe mental illness, his having to live with relatives while his mother was institutionalized, and poverty (App. A 20-21). As set forth, *supra*, at pages 7-11, in the statement of facts, this mischaracterizes Gribble's childhood. Indeed, the evidence shows that the periods of Gribble's mother's institutionalization were very brief, less than two months, and that during these periods Gribble lived with grandparents or other members of his extended family, whom siblings characterized as extremely nurturing. Gribble spent most of his first six years in the family home in Chicago, with his mother working occasionally and sometimes living on welfare. Further, Gribble only lived in the "shack without running water somewhere in the mountains of Tennessee" for two months, when he was six or seven years old, and for at least a part of that time there was running water. There is no evidence that the family ever went without food for any significant period of time, but, on occasion, they only had popcorn or bread and sugar in the house. After being in Tennessee for two months, Gribble's father brought him to Texas to live with him and, from that point on, Gribble was given numerous advantages.

This evidence was not even remotely probative of a reduced personal culpability for the capital murder. Gribble demonstrated no nexus between this evidence and the offense such that the offense was in any manner explained by his background or attributable to it. Although Dr. Winslade opined that Gribble's early childhood caused him to be very needy, he did not connect it with his uncontrolled sexual fantasies or this murder (R VII 1303). Moreover, while the evidence does not establish that Gribble had an

ideal childhood, neither does it demonstrate a degree of impoverishment or abuse that society would naturally believe to lessen his culpability. The Eighth Amendment does not ascribe constitutional relevance to background or character evidence merely because a defendant proffers it and characterizes it as reflecting an impoverished, disadavantaged or abusive childhood.[14] By not requiring background and character evidence to reflect a level of disadvantage or abuse that society would view as mitigating and by dispensing with the requirement of a demonstrated nexus between such mitigating evidence and the commission of the capital offense, the court below authorized nothing more than the dispensation of mercy based on sympathy, pity or mere whim.

Requiring consideration of mitigating evidence to be limited and guided by its relevance to personal culpability and potential for rehabilitation renders the jury's verdict a reasoned moral response to the proffered mitigating evidence. "It is no doubt constitutionally permissible, *if not constitutionally required*, for the State to insist that 'the individualized assessment of the appropriateness of the death penalty be a moral inquiry into the culpability of the defendant and not an emotional response to the mitigating evidence.'" *Saffle v. Parks*, 494 U.S. at ___, 110 S.Ct. at 1262 (emphasis added), *quoting California v. Brown*, 479 U.S. at 545. Where the sentencing decision can be based on evidence that is irrelevant to a defendant's personal culpability for the crime or his capacity for rehabilitation, there is a substantial risk that the sentence may reflect the jurors' emotional sensitivities or sympathy rather than a reasoned moral response. Such a sentencing proceeding runs afoul of the "long-standing recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary." *Saffle v. Parks*, 494 U.S. at ___, 110 S.Ct. at

[14] Under a sentencing scheme that allowed the jury to give mitigating weight to any proffered character or background evidence, a jury would be free to give mitigating weight to race or membership in social organizations such as the Ku Klux Klan.

1262, *citing Gregg v. Georgia*, 428 U.S. 153, 189-95 (1976); *see also Gardner v. Florida*, 430 U.S. 349, 358 (1977) ("it is of vital importance . . . that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"). The decision of the court below authorizes impermissibly arbitrary sentencing.

A defendant's Eighth Amendment interest in reliable sentencing is not implicated where, as here, there is no "reasonable likelihood that the jury [. . .] appli[ed] the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *See Boyde v. California*, 494 U.S. at ___, 110 S.Ct. at 1198. Under such circumstances, the policy against retrial years after the first trial is preeminent. *Id.*

CONCLUSION

For the foregoing reasons, the state respectfully requests that the writ of certiorari to the Texas Court of Criminal Appeals issue.

Respectfully submitted,

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APPENDICES

APPENDIX A

TIMOTHY LANE GRIBBLE, Appellant

NO. 70,773 v. - - - - Appeal from GALVESTON County

THE STATE OF TEXAS, Appellee

OPINION

Appellant was convicted of capital murder, it being alleged that he committed the murder of Elizabeth Jones[1] during the course of kidnapping her. See V.T.C.A., Penal Code 19.03 (a) (2). After the jury answered the submitted special issues in the affirmative, the trial judge assessed appellant's punishment at death. Art. 37.071 (e), V.A.C.C.P. Appeal to this Court is automatic. See Art. 37.071 (h), V.A.C.C.P.; Rule 40 (b) (1), Tex.R.App.Pro.

In the interest of justice, we will address and decide the issue whether the evidence is sufficient to establish the allegation that went to the underlying felony offense of kidnapping, i.e., it is alleged in the indictment in this cause that appellant committed the murder of Jones during the course of kidnapping her, which caused the offense of murder to be elevated to the offense of capital murder. See V.T.C.A., Penal Code Sec. 19.03 (a) (2). We will hold that the evidence is sufficient to sustain that allegation of the indictment.

Because we interpret appellant's fifth, twelfth, and thirteenth points of error as challenging the sufficiency of the evidence to sustain his capital murder conviction, we

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[1] The victim, Elizabeth Jones, was a 36 year old professional woman. She was a Phi Beta Kappa in mathematics who worked on space shuttle software development at NASA. She had a managerial position in the verification department at NASA.

will also address, but will overrule, these points of error.[2] Furthermore, we will address and sustain appellant's points of error numbered fourteen, fifteen, sixteen, seventeen, and eighteen.[3] We will not address appellant's other points

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[2] (Point Five):

> The admissible evidence adduced at the trial of the case was legally insufficient to support the appellant's conviction of capital murder, or of any lesser included offense;

(Point Twelve):

> The district court erred in denying the appellant's motion for instructed verdict, and in entering its judgment of conviction of capital murder, because the evidence was legally insufficient to prove the elements of the offense of kidnapping by corroborating the statements of the defendant admitted into evidence;

(Point Thirteen):

> The evidence was legally insufficient to sustain a conviction of capital murder, because the State failed to disprove beyond a reasonable doubt those portions of the appellant's statements, offered into evidence by the State, which establish that the appellant did not deliberately cause the death of Elizabeth Jones.

[3] These points of error assert that the trial court erred by:

> (Point 14): Failing to instruct the jury that any mitigating evidence may be sufficient to cause the jury to have a reasonable doubt as to an affirmative answer to any special issue;
>
> (Point 15): Failing to instruct the jury that a negative answer to any of the special issues should be made if the evidence mitigating against the death penalty covers a reasonable doubt as to any special issue;
>
> (Point 16): Failing to instruct the jury to answer any special issue "no" if the jury finds any aspect of the Defendant's character, record, or mental illness or any circumstances of the offense mitigate against imposition of the death penalty;

(Footnote continued on next page)

of error.[4]

I.

On September 8, 1987, Elizabeth Jones disappeared. When she missed work the next day, her friends began to search for her. They hired a private investigator, notified

(Footnote continued from previous page)

(Point 17): Failing to instruct the jury that if any mitigating evidence creates a reasonable doubt that the death penalty is appropriate, the jury should answer either of the special issues "no", independently of whether such evidence is relevant to the special issues, and regardless of what the jury found the answers to the special issues should be;

(Point 18): Failing to submit a third special issue inquiring whether the jury had a reasonable doubt, in view of any mitigating evidence, that the death penalty should not be imposed.

[4] They are the following:

(Point One): The District Court erred in admitting the defendant's written statement, given to Mary Wood, a private Investigator, because Ms. Wood failed to advise the Defendant of his Miranda rights in accordance with Article 38.22 of the Texas Code of Criminal Procedure, and the statement was made in the contest of or in response to a custodial interrogation;

(Point Two): The District Court erred in admitting the Defendant's written statement to Mary Wood, Private Investigator, because the statement was made after the Defendant requested that the interview not proceed, which request was not honored;

(Point Three): The District Court erred in admitting the Defendant's tape-recorded confession given to law enforcement officers on October 3, 1987, together with all evidence subsequently derived therefrom, because the interrogators refused to honor the Defendant's request to terminate the interrogation;

(Footnote continued on next page)

local law enforcement authorities, and called area hospitals, all to no avail. Several weeks later, appellant confessed to killing her and showed the police where he had concealed her body.[5]

(Footnote continued from previous page)

(Point Four): The District Court erred in admitting into evidence the fact that the Defendant led Texas Ranger Joe Haralson and Galveston County Sheriff's Department Investigator Wayne Kessler to the remains and purse of Elizabeth Jones, those items of evidence, and all evidence derived therefrom, because those events occurred after the Defendant's unequivocal request to consult with an attorney, which was not honored;

(Points Six, Seven, and Eight): The District Court erred in overruling the Defendant's challenges for cause to venirepersons Thomas Gray (Point 6), Katalina Ruiz (Point 7), and Donna Jennings Sunseri (Point 8), because these jurors expressed a strong prejudice against the minimum punishment of life imprisonment for the offense of capital murder;

(Points Nine, Ten, and Eleven): The District Court erred in failing to grant the Defendant's Motion for Mistrial or in overruling Defendant's objection, following several references by State's witnesses and the prosecutor to the unindicted offense of rape or sexual assault upon Elizabeth Jones, at the following points in the trial - a) when Texas Ranger Joe Haralson remarked that the Defendant confessed to raping Elizabeth Jones, b) when the prosecutor deliberately made references to sexual assault when cross-examining a defense witness, c) when the prosecutor made pointed remarks during closing argument;

[5] The following narrative account of this crime is an abbreviated version of appellant's own statements to police and private investigators. No other evidence in the record tends to connect him with the crime, nor is there any evidence remotely suggesting that events transpired in a way other than as described by him. Thus, although appellant's account may seem implausible in certain particulars, it is nevertheless uncontroverted by any evidence affirmatively suggesting an alternative scenario.

According to a composite of various statements appellant gave to the police and private investigators over a period of time, appellant admitted that he had been working as a roofer on a crew remodeling the deceased's home, and that on the date of her disappearance he was the last workman at the site and, before leaving, was permitted to use the bathroom in the residence. Later, after eating dinner with his wife and step-children, appellant left home to return several rented videotapes, but found the store to which he went closed. On the way back he drove past the house of Jones, the deceased, and stopped. He could see that Jones had retired for the night, but knocked on the front door anyway. When Jones answered the door, she was dressed only in a robe. Appellant told her that he had lost his wallet, which he hadn't, and wondered if he might have left it in her bathroom. She consented to him entering her house on this pretext. Appellant claimed that thereafter they drank wine, talked, and had consensual sex. Appellant also claimed that the deceased expressed a desire to visit Paris, France, and that he took her to the Houston Intercontinental Airport the next morning in exchange for the promise of substantial payment. The latter statements were proved by the police to be false. Appellant also admitted that once inside of Jones' residence he grabbed Jones' wrist after which she resisted but he claimed that she willingly participated in sexual relations with him for several hours. Afterwards, they talked for a while and watched television. Eventually, appellant fell asleep on her bed.

Sometime later, still before dawn, appellant woke up. The deceased had made coffee, and urged appellant to leave so that she could dress for work. He asked her not to tell anyone about his being there but, in spite of his pleas, she told him that she was going to notify the police about how he had sexually abused her. Panicked by her refusal to relent, appellant ordered her into his truck. He made her lie down with her head in his lap so that she wouldn't know where they were going. After driving aimlessly for an hour, he finally stopped at a secluded place in the county, approx-

imately ten miles from Jones' residence. Appellant's intention at that time was apparently to tie Jones up so that he would have time to see his family and leave town before she could report him to the police, but when his intentions became clear to her, she began to scream for help. In an effort to silence her, appellant looped the sash from her robe around her neck and pulled it tight. To his surprise, she was dead within a few minutes. He then dragged her body beneath a tree and covered it with brush. When appellant returned to his truck he discovered the deceased's purse and, after filling it with rocks, threw it into a nearby lake.

Based on the above, police investigators discovered the remains of Elizabeth Jones' body and her purse in exactly the locations appellant described. Jones' body and her purse were found almost a month after she had been reported missing.

II.

In his fifth point of error, appellant maintains that the confession offered against him at trial was illegally obtained and that, absent its introduction, the evidence was insufficient to connect him with the offenses alleged in this case. In making this argument, appellant overlooks the principle of law that the sufficiency of the evidence to sustain appellant's conviction is determined by evaluating the probative weight of *all* the evidence that the trial judge permitted the jury to consider, including erroneously admitted evidence. *Beltran v. State*, 728 S.W.2d 382, 389 (Tex.Cr.App. 1987); *Porier v. State*, 662 S.W.2d 602, 606 (Tex.Cr.App. 1984). Because appellant does not contend that *all* the evidence admitted at his trial was insufficient to sustain his conviction for capital murder, his fifth point of error is overruled. *Faulder v. State*, 745 S.W.2d 327, 330 (Tex.Cr.App. 1987); *Collins v. State*, 602 S.W.2d 537 (Tex.Cr.App. 1980).

III.

Appellant claims in his thirteenth point of error that his confession contained exculpatory material which the State failed to disprove, rendering the evidence insufficient to support his conviction.

Prior to adoption of the Texas Rules of Criminal Evidence, effective September 1, 1986, our case law provided that "[w]here the state puts in evidence the statements of the accused party which exculpates the accused, and does not directly or indirectly disprove them, the accused is entitled to an acquittal." *Palafox v. State*, 608 S.W.2d 177 (Tex.Cr.App. 1980), quoting from *Banks v. State*, 56 Tex.Cr.R. 262, 265, 119 S.W. 847, 848 (1909). Although application of this rule was subject to considerable disagreement, we have since held "that for cases tried after the effective date of Tex.R.Crim.Evid. Rule 607, the State will not be bound by exculpatory statements which previously fell under the voucher rule pursuant to *Palafox*, 608 S.W.2d 177." *Russeau v. State*, 785 S.W.2d 387, 390 (Tex.Cr.App. 1990).

In this cause, the State had the burden to prove beyond a reasonable doubt that appellant killed his victim intentionally during the course of kidnapping her or attempting to kidnap her in order to establish the offense of capital murder. Because appellant's confession reports only an accidental or negligent killing of the deceased, it is alone insufficient for this purpose. But it does not follow that the State's burden is somehow made greater by introduction of appellant's confession into evidence. Requiring the State to disprove beyond a reasonable doubt that appellant killed the deceased unintentionally is neither qualitatively nor quantitatively different than requiring it to prove beyond a reasonable doubt that he killed her intentionally. Accordingly, the fact that the State offered appellant's confession, which admitted to an unintentional killing of the victim, does not in the least affect the State's

burden of proof as regards appellant's culpable mental state when the offense was committed.[6]

Because appellant does not claim that the evidence, taken as a whole, was insufficient to prove that he killed the deceased intentionally, we overrule his thirteenth point of error.

IV.

In point of error number twelve, appellant asserts that "The District Court erred in denying the Defendant's Motion for Instructed Verdict, and in entering its judgment of conviction of capital murder, *because the evidence was legally insufficient to prove the elements of the offense of kidnapping by corroborating the statements of the Defendant admitted into evidence.*" (Our emphasis.)[7]

[6]Quite apart from any judicially-created rule, the Penal Code has long provided that defenses raised by evidence from any source, including that offered by the defendant, must be disproven beyond a reasonable doubt by the State. The Penal Code even requires that the jury be instructed to such effect. *See* V.T.C.A., Penal Code § 2.03 (d). As applied to statutory defenses, therefore, the rule articulated in cases such as *Palafox* was merely a logical corollary of the general rule respecting burdens of proof on defensive issues under the Penal Code, and required no different or greater proof than that already prescribed by statute law. But the claim of accident or negligence in appellant's confession was not a defense within the meaning of the Penal Code, since it did not admit the offense alleged and then set up an excuse or justification for its commission. Rather, it merely denied an essential element of the crime.

Of course, under the Penal Code, defendants have the burden to prove "affirmative defenses" by a preponderance of evidence. V.T.C.A., Penal Code § 2.04 (d). We express no opinion whether the rule of *Palafox*, to the extent it may still apply to cases tried before September 1, 1986, requires the State to disprove any "affirmative defenses" in the confessions it introduces.

[7]In disposing of this point of error we assume, without deciding, that appellant's confession does, indeed, admit a kidnapping of the deceased.

(Footnote continued on next page)

We pause to point out that the record reflects that appellant did not present any evidence after the State rested its case and after appellant's motion for an instructed verdict of not guilty was overruled by the trial judge. Cf. *Kuykendall v. State*, 609 S.W.2d 701 (Tex.Cr.App. 1981).

This Court has long subscribed to a variant of the common law rule that an extrajudicial confession of the accused is insufficient to support conviction unless corroborated.[8] In Texas, as in most other American jurisdictions, the rule has been construed to require independent evidence of the *corpus delicti*, not merely support for credibility of the confession.[9] Although often inconsistent

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(Footnote continued from previous page)
See, however, *post*. So far as we are able to determine from studying his motion for instructed verdict at trial and his brief to this Court on appeal, appellant contends only that,

> . . . it was just as likely that Ms. Jones was murdered elsewhere as the State's hypothesis that Ms. Jones was abducted from her home, kidnapped and taken to that spot, and then murdered. Also, contrary to the State's hypothesis of kidnapping, the investigating police officer could observe at the Defendant's [sic] residence no sign of a struggle or anything broken.

Appellant's Brief, pp. 51-52. We take this argument to mean that appellant urges a lack of corroborative evidence showing the deceased was, while still alive, "mov[ed] . . . from one place to another" or that, if she was moved, it was "without consent[.]" *See* V.T.C.A, Penal Code § 20.01 (1). In short, he claims there is no evidence even to corroborate the hypothesis that the deceased was restrained. We address appellant's point of error strictly from this perspective and express no opinion whether the evidence fails to corroborate other elements of kidnapping.

[8] Basic information about the history and purposes of the rule may be found at 7 WIGMORE, EVIDENCE §§ 2070-2074 (1963) and Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession*, 103 U.PA.L.REV. 638 (1955).

[9] See generally MCCORMICK, EVIDENCE § 158 (2d ed. 1972).

in our understanding of the term,[10] we have usually held *corpus delicti* to mean harm brought about by the criminal conduct of some person. *Bridges v. State*, 172 Tex.Cr.R. 655, 362 S.W.2d 336, 337 (1962). Thus, the extrajudicial confession of a criminal defendant must be corroborated by other evidence tending to show that a crime was committed. *Brown v. State*, 576 S.W.2d 36, 42-43 (Tex.Cr.App. 1979)(opinion on rehearing); *Watson v. State*, 154 Tex.Cr.R. 438, 227 S.W.2d 559, 562 (1950). It need not be corroborated as to the person who committed it,[11] since identity of the perpetrator is not a part of the *corpus delicti* and may be established by

[10] See, e.g., text accompanying footnotes 48 and 54 in 25 TEX. JUR. 3d. *Criminal Law* § 3437 (1983).

[11] A significant body of case law from this Court, appearing sporadically over the years, is to the contrary. *See, e.g., Lott v. State*, 60 Tex.Cr.R. 162, 131 S.W. 553, 555 (1910); *Black v. State*, 137 Tex.Cr.R. 173, 128 S.W.2d 406, 409 (1939); *Franklin v. State*, 140 Tex.Cr.R. 251, 144 S.W.2d 581 (1940); *Bell v. State*, 149 Tex.Cr.R. 509, 196 S.W.2d 923, 924 (1946); *Threet v. State*, 157 Tex.Cr.R. 497, 250 S.W.2d 200 (1952); *Rios v. State*, 398 S.W.2d 281, 282 (Tex.Cr.App. 1966); *Perez v. State*, 432 S.W.2d 954 (Tex.Cr.App. 1968).

However, in *Self v. State*, 513 S.W.2d 832, 834-835 (Tex.Cr.App. 1974), we noted the discrepancy and disapproved prior opinions holding or intimating that the *corpus delicti* of a crime includes identity of the person who committed it. *See also Soffar v. State*, 742 S.W.2d 371, 375 (Tex.Cr.App. 1987); *Scott v. State*, 732 S.W.2d 354, 358 (Tex. Cr.App. 1987); *Streetman v. State*, 698 S.W.2d 132, 134-135 (Tex.Cr.App. 1985). Yet our own application of the standard sometimes belies any real understanding of, let alone committment to, the rule. Take, for example, our opinion in *Jackson v. State*, 652 S.W.2d 415, 419 (Tex.Cr.App. 1983), decided *en banc* without written dissent. After correctly identifying the *corpus delicti* of murder as "death caused by criminal means" and holding that an extrajudicial confession must be corroborated as to the *corpus delicti*, we then concluded that "[t]he evidence is sufficient to corroborate appellant's confession that she struck the child with her elbows[,]" even though identity of the criminal actor clearly needs no corroboration. Still, in an ironic twist, we reversed the conviction for insufficient evidence to show the cause of death, a matter which undoubtedly was a part of the *corpus delicti* and thus required at least some evidentiary support independent of the confession. *See also Johnson v. State*, 691 S.W.2d 619, 622-624 (Tex.Cr.App. 1984).

an extrajudicial confession alone.[12] *Dunn v. State*, 721 S.W.2d 325, 333-334 (Tex.Cr.App. 1986); *Harris v. State*, 516 S.W.2d 931, 932 (Tex.Cr.App. 1974); *Estes v. State*, 160 Tex.Cr.R. 632, 274 S.W.2d 411, 412 (1955).

Although we recently confronted the problem in a related context, we have not yet expressly decided whether an extrajudicial confession of a defendant must be corrobo-

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[12] The jury was instructed in this case that,

> . . . if you find from the evidence beyond a reasonable doubt, that the defendant made a confession to the commission of the offense of kidnapping or attempted kidnapping, still, you cannot convict the defendant of capital murder unless you find from the evidence beyond a reasonable doubt that there is *other evidence before you in this case which, of itself, tends to connect the defendant with the crime of kidnapping or attempted kidnapping*, if any, *separate and apart from the alleged confession*, if any, *of defendant's*, and if you have a reasonable doubt that there is such *other evidence that the offense of kidnapping or attempted kidnapping, as alleged, in fact occurred*, then you will acquit the defendant of capital murder and consider whether he is guilty of murder. (Emphasis added.)

As is apparent from the emphasized portions of this charge, the jury was told that *it might not convict of capital murder without corroboration both connecting appellant with commission of kidnapping or attempted kidnapping and establishing the corpus delicti of one such offense*. The requirement of corroboration which "tends to connect the defendant with the crime" is characteristic of the rule applicable to corroboration of accomplice testimony, and does not apply to confessions of the accused. *See* Art. 38.14, V.A.C.C.P.; *Kincaid v. State*, 131 Tex.Cr.R. 101, 97 S.W.2d 175, 177 (1936). However, because the jury was here instructed not to convict appellant without other evidence showing his identity as the criminal actor, a conviction was not authorized in the instant cause without such evidence. *Boozer v. State*, 717 S.W.2d 608 (Tex.Cr.App. 1984). *See also*, *Benson v. State*, 661 S.W.2d 708 (Tex.Cr.App. 1983), and *Ortega v. State*, 668 S.W.2d 701 (Tex.Cr.App. 1983). Appellant, however, does not complain on appeal that there was insufficient evidence apart from his confession actually connecting him with commission of the offense.

rated as to multiple elements of the underlying felony offense.[13] Appellant's twelfth point of error clearly presents the question here. The offense of capital murder under our law, as charged in the instant cause, requires not only the commission of murder as defined elsewhere in the Penal Code, but also that the murder be committed during the course of kidnapping. Kidnapping is a separate crime under the Penal Code and one which, as with all crimes, has its own *corpus delicti*. *See* V.T.C.A., Penal Code § 20.03 (a). Appellant maintains that, while the *corpus delicti* of murder was shown by evidence apart from his extrajudicial confession, the *corpus delicti* of kidnapping was not. We disagree.

Because the essential purpose of the corroboration requirement is to assure that no person be convicted without some independent evidence showing that the very crime to which he confessed was actually committed, we agree that the *corpus delicti* of capital murder includes more than merely homicide by a criminal agency.[14] In the

[13] Relying on *Holladay v. State*, 709 S.W.2d 194 (Tex.Cr.App. 1986), which construed Art. 38.14, V.A.C.C.P., the accomplice witness statute, we recently held that the testimony of an accomplice in a capital murder prosecution need not be corroborated as to the elements which distinguish murder from capital murder. *Romero v. State*, 716 S.W.2d 519, 520 (Tex.Cr.App. 1986)("aggravated sexual assault" elements); *Anderson v. State*, 717 S.W.2d 622, 630- 631 (Tex.Cr.App. 1986) ("remuneration" elements); *May v. State*, 738 S.W.2d 261, 266 (Tex.Cr. App. 1987)("robbery" elements). However, this is so in large measure because, unlike extrajudicial confessions, testimony of an accomplice need be corroborated only as to facts "tending to connect the defendant with the offense committed[,]" and not as to the *corpus delicti* itself.

[14] As appellant points out in his brief, our opinion in *Penry v. State*, 691 S.W.2d 636, 648-649 (Tex.Cr.App. 1985), intimates that this is true, without specifically discussing the issue, by simply observing, in context of the capital offense there alleged, that "... the corpus delicti consists of a victim whose death was caused by the criminal act of another *in the course of committing or attempting to commit rape*." Although *Penry* is of only the most attenuated precedential value in the instant cause, we note that our holding here is not inconsistent with our disposition of the similar claim presented there. *See also White v. State*, 591 S.W.2d 851, 862-864 (Tex.Cr.App. 1979).

present context, we hold that *evidence independent of appellant's confession was required to show that his victim had been kidnapped.*

Such evidence need not, however, be sufficient by itself to prove the offense of kidnapping. Honea v. State, 585 S.W.2d 681, 684 (Tex.Cr.App. 1979); *Valore v. State*, 545 S.W.2d 477, 479 (Tex.Cr.App. 1977). Because the rule peremptorily reduces the weight of admissible evidence for policy reasons originated by this Court without express legislative sanction, we have held that the quantum of independent evidence necessary to corroborate the *corpus delicti* in a criminal prosecution relying upon the extrajudicial confession of an accused need not be great.[15] *Self v. State*, 513 S.W.2d at 835-837. So long as there is some evidence which renders the *corpus delicti* more probable than it would be without the evidence, we believe that the essential purposes of the rule have been served. *Woolridge v. State*, 653 S.W.2d 811, 816 (Tex.Cr.App. 1983); *White v. State*, 591 S.W.2d at 864.

While there is little, apart from appellant's confession, to suggest that Elizabeth Jones, the deceased, was moved from her residence without her consent and while still alive to the place where her body was ultimately discovered, we are not persuaded that the record is utterly devoid of evidence to this effect. The distinctions between

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[15] Indeed, when evidence independent of the confession is alone sufficient to prove *corpus delicti*, the jury need not even be instructed that an extrajudicial confession must be corroborated. For a partial genealogy of this interesting anomaly, in which the rule is transformed from an isolated holding of harmlessness based on overwhelming evidence into a general doctrine of no error based on the sufficiency of evidence, see *Willard v. State*, 27 Tex.App. 386, 11 S.W. 453 (1889), *Mayfield v. State*, 92 Tex.Cr.R. 532, 244 S.W. 819 (1922), *Johnson v. State*, 117 Tex.Cr.R. 103, 36 S.W.2d 748 (1931), *Smith v. State*, 157 Tex.Cr.R. 21, 246 S.W.2d 187 (1952), *Engledow v. State*, 407 S.W.2d 789 (Tex.Cr.App. 1966), *Honea v. State*, 585 S.W.2d 681, 687 (Tex.Cr.App. 1979), and *Baldree v. State*, 784 S.W.2d 676, 686-687 (Tex.Cr.App. 1989).

the offenses of attempted kidnapping and kidnapping are unimportant here because the problem relating to the sufficiency of the evidence as to the one is equally applicable to the other, i.e., from the facts, if the evidence is sufficient as to the one, it is surely sufficient as to the other. Certainly the circumstances militate in favor of a conclusion that the deceased would not willingly have travelled, either alone or in the company of another, to an uninhabited area of the county, carrying a purse and wearing nothing but a bathrobe. The discovery of her body under such conditions does, in our view, render it more likely that she was taken to the scene without consent. Whether she was alive at the time is, of course, a separate question.[16]

Neither the medical examiner nor other investigating officials could determine *where* Elizabeth Jones was murdered. However, her body was found some four weeks after she was reported missing in a remote field in Galveston County approximately ten miles from her residence. It is, of course, possible that she was strangled at home and then moved by appellant to the country. However, at least three circumstances seem to render this hypothesis less likely. In the first place, there is no apparent motive for moving the body under circumstances such as are presented here. If the deceased were really killed at home, we believe that a rational trier of fact might well expect appellant to have left her body there. Certainly, it is not apparent that doing so would somehow have cast greater suspicion on him, whereas

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[16]We accept for purposes of analysis that a dead body cannot be kidnapped. Under V.T.C.A., Penal Code § 20.03 (a), kidnapping is defined as the knowing or intentional abduction of a "person." A "person," if not an association or corporation, must be an "individual." An "individual," in turn, is "a human being who has been born and *is alive*." V.T.C.A., Penal Code § 1.07 (a) (17), (27). (Emphasis added) It follows that only corporations, associations and living humans can be kidnapped in violation of § 20.03 (a). Since a dead body is none of these things, contrary to a corporation, thus moving it from place to place does not under any circumstances constitute the offense of kidnapping. *See and compare Vaughan and Sons, Inc. v. State*, 737 S.W.2d 805 (Tex.Cr.App. 1987).

the very act of transporting a dead body in a pickup truck, even in the early morning hours, would doubtlessly have increased the risk of his being seen by others.

Moreover, if Elizabeth Jones were murdered at home, we believe that a rational trier of fact would expect the investigating officers to find some evidence of a struggle. Instead, they discovered nothing to indicate any disturbance at her residence — no sign of injury to any person, and nothing broken, damaged or overturned. Neighbors reported hearing no screams or other loud noises on the night in question.

Finally, the fact that the deceased's purse was also taken would, we believe, imply to a rational trier of fact that she was alive in appellant's truck when she left her residence. At a minimum, we believe it would seem improbable to any rational trier of fact that appellant would have bothered to take the purse had he murdered her at home. We also believe that, if inclined to steal her money or other valuables, it is more likely that any rational trier of fact would have concluded that appellant would have emptied the purse beforehand. What seems to us to be a far better explanation here is that Elizabeth Jones, the deceased, brought the purse along herself, hoping for some opportunity to get free of her abductor.

Although these circumstances are ambiguous in some respects and far from adequate to support the conclusions they imply, *the evidence required for corroboration of an extrajudicial confession need only render the corpus delicti more probable than it would be without the evidence.* Therefore, *we find that any rational trier of fact could have found that there was some evidence that the corpus delicti of kidnapping was sufficiently corroborated as to the elements about which appellant complains.* Also see the above instruction to the jury that the trial court gave in this cause. His twelfth point of error is, therefore, overruled.

V.

Although we believe that we have sufficiently answered, and correctly overruled, appellant's twelfth point of error, namely, that "[t]he District Court erred in denying the Defendant's Motion for Instructed Verdict, and in entering its judgment of conviction of capital murder, *because the evidence was legally insufficient to prove the elements of the offense of kidnapping by corroborating the statements of the Defendant admitted into evidence,*" (our emphasis), we also find that we must, in the interest of justice, decide whether the State proved beyond a reasonable doubt that appellant murdered Jones during the course of kidnapping Jones.[17] We find that the evidence is sufficient.

This Court has repeatedly held that a capital murder indictment need not allege the constituent elements of the aggravating feature which elevates the offense of murder to capital murder. *Bethard v. State*, 767 S.W.2d 423, 431 (Tex.Cr.App. 1989). However, this is not to say that in order to establish the offense of capital murder the State need not prove that the murder occurred during the course of some underlying offense, such as the offense of kidnapping which was alleged in this cause as the underlying offense.

We observe that the San Antonio Court of Appeals, in *Guerra v. State*, 690 S.W.2d 901 (Tex.App.-4th Dist. 1985), no pet., henceforth *Guerra*, was confronted with resolving the issue whether the evidence was sufficient to establish that the murder that occurred in that cause was committed during the course of committing the offense of kidnapping or attempted kidnapping. The court of appeals concluded that under the facts that were presented the circumstantial evidence was sufficient to sustain the

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[17] Sufficiency of the evidence to support a conviction implicates the Fourteenth Amendment to the Constitution of the United States and the due course of law clause of the Texas Constitution. See Art. I, Sec. 19. E.g., *Acevedo v. State*, 633 S.W. 2d 856 (Tex.Cr.App. 1982).

allegations that went to the underlying offense. We agree with the court of appeals' conclusion.

The court of appeals pointed out that its case was a circumstantial evidence case and that the standard for reviewing the sufficiency of the evidence is the same for either direct or circumstantial evidence cases; namely, an appellate court must examine the evidence in the light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the offense beyond a reasonable doubt. See *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791-2, 61 L.Ed.2d 560, 576-7 (1979). Also see *Purtell v. State*, 761 S.W.2d 360 (Tex.Cr.App. 1988); *Marras v. State*, 741 S.W.2d 395, 400 (Tex.Cr.App. 1987); *Carlsen v. State*, 654 S.W.2d 444, 447 (Tex.Cr.App. 1983); *Freeman v. State*, 654 S.W.2d 450, 454 (Tex.Cr.App. 1983); and *Vanderbilt v. State*, 629 S.W.2d 709, 715-16 (Tex.Cr.App. 1981).

We find that the court of appeals in *Guerra* correctly observed that a part of our law of circumstantial evidence is that a conviction based on circumstantial evidence cannot be sustained unless the circumstances exclude every reasonable hypothesis except guilt of the defendant. Proof amounting to no more than a strong suspicion or mere probability of guilt is not sufficient to convict. E.g., *Schershel v. State*, 575 S.W.2d 548, 550 (Tex.Cr.App. 1979); *Bryant v. State*, 574 S.W.2d 109, 111 (Tex.Cr.App. 1978). It is not necessary, however, that every fact point directly and independently to the defendant's guilt; it is enough if the conclusion is warranted by the combined and cumulative force of all the incriminating circumstances. *Sullivan v. State*, 564 S.W.2d 698, 705 (Tex.Cr.App. 1977); *Flores v. State*, 551 S.W.2d 364, 367 (Tex.Cr.App. 1977); *Herndon v. State*, 543 S.W.2d 109, 121 (Tex.Cr.App. 1976). However, the State is not required to exclude to a moral certainty every hypothesis that the offense may have been committed by another person; it must only exclude every reasonable hypothesis that might exist from the facts, which hypothesis

must be consistent with the facts proved and the circumstances, and the premise that the offense may have been committed by another person must not be out of harmony with the evidence. See e.g., *Sullivan*, supra; *Flores*, supra; *Jones v. State*, 442 S.W.2d 698, 702 (Tex.Cr.App. 1969); and *Vanderbilt*, supra, at 716.

The elements of kidnapping are that a person: (1) intentionally or knowingly (2) abducts (3) another person. V.T.C.A., Penal Code Sec. 20.03(a). "Abduct" is defined to mean "to restrain a person with intent to prevent his liberation by: (A) secreting or holding him in a place where he is not likely to be found; or (B) using or threatening to use deadly force." V.T.C.A., Penal Code, Sec. 20.01(2). In this instance, it was incumbent upon the State to prove beyond a reasonable doubt that appellant murdered Jones during the course of kidnapping her.

The State correctly points out the following in its brief (page references to the record omitted):

> In the present case, Appellant confessed to panicking when the victim told him she was going to the police [to tell them] about the sexual assault [he had committed upon her]. He then had her get into his truck. She was wearing nothing but a robe. He made her lie down in the truck so she wouldn't know where she was. He then drove around for a long time. Appellant eventually stopped the truck in a remote location some ten miles from the victim's house. There he strangled her. He then threw her purse in some water at another remote location. After Appellant confessed, he led officers to the remote locations where the body and purse were found. (Page 30.)

The facts also reflect that Jones, the deceased, was discovered missing on September 9, 1987, and that her body was found almost one month later as a result of appellant's oral statement to the police that led them to where appellant said he had left her body and purse. It was established that appellant was the last person to have seen Jones alive at her residence, where appellant had worked as a roofer on her house. Over a month later, appellant was arrested in Tennessee for this offense. Although appellant did not admit where he murdered Jones, he admitted that he killed Jones, hid her body in a secluded location, and disposed of her purse at a different location.

We have previously pointed out some possible reasonable hypotheses that might be applicable to this cause. We believe that we have sufficiently demonstrated how any rational trier of fact could have concluded that the State disproved them. We also find that any rational trier of fact could have determined the evidence was sufficient to show the murder of Jones occurred in the course of appellant's committing the offense of kidnapping of Jones, and that the State disproved any outstanding reasonable hypotheses.

VI.

The record reflects that at the penalty phase of the trial appellant requested that the judge give the jury various instructions which would have collectively authorized the jury, irrespective of its answers to the statutory punishment questions, to decide that he should not be put to death.[18] He claims that the Eighth Amendment of the United States Constitution entitled him to such an instruction because he proffered mitigating evidence at trial which, for reasons pertinent not only to the statutory questions, might have moved some or all of the jurors to conclude that he should not be assessed the death penalty.

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[18] See footnote number 3, *ante*.

Accordingly, he argues that failure of the trial judge to instruct the jurors as requested effectively precluded their giving mitigating effect to this evidence. We agree.

The Texas capital sentencing scheme does not invariably operate in such a way as to violate the Eighth Amendment. *See Franklin v. Lynaugh*, 487 U.S. ___, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). But, at least whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentencer given no means to prescribe, based on such mitigating evidence, a less severe punishment. *Penry v. Lynaugh*, 492 U.S. ___, 109 S.Ct. 2934, ___ L.Ed.2d ___ (1989).

In the instant cause, testimony offered by appellant revealed a troubled and insecure childhood in which his mother was institutionalized for a severe mental illness and his father imprisoned for burglary. Only an infant at the time, appellant suffered greater mental and emotional hardship as a result of these traumatic events than did his older siblings. During the first several years of his life, he and the other children were shuffled among relatives, never living in one place for very long.

After his parents were released from their respective confinements, appellant lived for a time with his mother. She had since divorced his father and remarried, living with her new husband and the children in a shack without running water somewhere in the mountains of Tennessee. Within a few months, appellant's step-father disappeared, leaving his mother pregnant and without food for the two

youngest children. Unable to care for her family, appellant's mother spent much of her time in bars, often bringing strange men home at night. During his early formative years, there was no responsible adult figure in appellant's life.

Largely as a result of these circumstances, appellant's own mental and emotional condition was, and remained at the time of trial, abnormal. Doctor William Winslade, a psychoanalyst, testified that after much effort on his part he persuaded appellant to disclose to him that on two occasions appellant's mother had sexually abused appellant as a small child, requiring him to perform oral sex on her. Finally, Dr. Winslade opined that those experiences, even if they were untrue fantasies, provided a substantial explanation for the appellant's subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother. Dr. Winslade concluded that appellant developed a delusive fear of sexual domination, and that throughout his adult life this fear intermittently erupted into acts of violence, which appellant forced upon women that, in his fantasies, he feared they might force upon him. Invariably his victims were women with whom he was acquainted on a casual basis and, following his sexual assaults upon them, he customarily acted with incongruous', even bizarre, familiarity, more characteristic of an intimate encounter than a brutal attack.

That he was able to keep these sexual aberrations secret from his family and friends over an extended period of time evinces a personal recognition of his abnormalcy. Virtually all persons with whom he was acquainted, including his teachers, the customers at his natural father's service station, where he worked, his wife and ex-wife, and his siblings, regarded him as stable, sensible, hard-working, polite, and generous. But at times his sexual fantasies became too great to resist, especially when he was under

the influence of alcohol or other drugs. At such times, he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of intense remorse.

If true, all of these circumstances are widely regarded, according to some contemporary social standards, as redeeming personality traits or factors which tend to ameliorate fault. See *Penry v. Lynaugh*, supra. As such, the sentencer in a capital proceeding must be authorized to mitigate punishment if it finds that a defendant's personal moral culpability was thereby reduced. This is not to say that the jury must assess a penalty less than death for all defendants who offer mitigating evidence at trial. But jurors may not be precluded from doing so by omission from the court's charge of a means to express their will. *Penry v. Lynaugh*, supra.

We hold that absent some functionally equivalent instructive device, that the jury could consider and give effect to the mitigating circumstances, the jury was not afforded the opportunity to express its judgment whether appellant, even if likely to be a continuing threat to society, should receive the death sentence.

Because under current law we have no authority to remand this cause for a new punishment hearing only, the trial court's judgment of conviction and sentence of death are reversed and the cause remanded to the trial court for further proceedings not inconsistent with this opinion.

TEAGUE, Judge

EN BANC

Miller and Campbell, J.J., with regard to the requested "mitigation charges" that are contained in footnote 3 of the majority opinion, believe that the one labeled "(Point 17)" is the best of the options that were given the trial judge

under the "punishment" facts that went to appellant's "personal culpability." Furthermore, in the treatment of appellant's point of error #12, they concur in the result only. With these remarks, they join the majority opinion.

White, J., concurs in the result.

McCormick, P.J., and Berchelmann and Sturns, J.J., dissent.

DELIVERED: November 14, 1990

PUBLISH

APPENDIX B

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

February 20, 1991

122ND DISTRICT COURT-87CR0828

RE: Case No. 70,773
STYLE: Gribble, Timothy Lane

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

MAIL TO: MARGARET PORTMAN GRIFFEY
ASSISTANT ATTORNEY GENERAL
SUPREME COURT BUILDING
AUSTIN, TX 78711

MR. MILLER: Yes, sir. We will object—

I think the Court will recall we filed a motion to quash the indictment before trial beginning, alleging Article 37.07 (1) of the Code of Criminal Procedure was unconstitutional to the extent that it did not permit, or allow, or provide for an instruction with regard to the use of any mitigating evidence, and how the Jury might consider any mitigating evidence, to the extent that it doesn't relate to special issues number one and two, in that that's in violation of the Eighth and Fourteenth Amendments of the Constitution as discussed in Eddings versus Oklahoma.

We would, basically, incorporate those same objections now to our objections to the charge, and I am going to quote from Penry versus Lynaugh. I have got the Fifth Circuit opinion 832 Federal Sixth [sic] 915, Fifth Circuit 1987, which I know the writ of certiorari is granted by Supreme Court, and to be decided this term, and makes the exact same objection in that case, and as to be determined by the Supreme Court in this term and that is the Court in this case failed to instruct the Jury to weigh aggravating/mitigating circumstances, and failed to authorize a discretionary grant of mercy based on the existence of mitigating circumstances. I would further make the same objection as in Penry to the lack of definition of probability, and the term criminal acts of violence, and continuing threat to society.

I would further specifically request that instructions be given to the following effect:

Number one, "You are instructed that any evidence which, in your opinion, mitigates against the imposition of the death penalty, including any aspect of the Defendant's character, or record, or any mental illness, and to any of the circumstances of the commission of the offense, may be

sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the special issues is yes, and in the event such evidence does cause you to have a reasonable doubt, you should answer the issue no," which I believe differs somewhat from the instruction the Court has now giving with regard to mitigating evidence.

I believe the Court, in this charge, has instructed the Jury they may include any evidence with regard to the Defendant's character, or record, or circumstances of the offense that they find — to the extent that that evidence causes them to have a reasonable doubt as to a particular issue and that they may then answer that issue no, and I believe that's different from the instruction that I just stated.

I would further request the following additional issues to be given, or instructions.

"An answer of no may be given to any of the special issues if at least ten jurors find that mitigating factors against the imposition of the death penalty exist, either in regard to any aspect of the Defendant's character, or record, any mental illness, or in regard to any of the circumstances of the commission of the offense, or if evidence of any such mitigating factors causes at least ten jurors to have a reasonable doubt as to whether the true answer to the issues is yes."

I would further request the following instruction, "You are instructed you may answer any of the special issues no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would further request an instruction that, "You are instructed that you may answer special issue number one no if you find any aspect of the Defendant's character, or

record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would also request an instruction which states, "You are instructed that you may answer special issue number two no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

I would also request an instruction that says something to the effect that, "You are instructed that you may consider evidence of the Defendant's mental illness, if any —"

Well, strike that. Let me — an instruction that would say, "If you find from the evidence of Defendant's mental illness, if any, independent of any relevance that such mental illness has to either of the special issues, that such evidence creates a reasonable doubt as to whether the death penalty is appropriate for this Defendant, due to such mental illness, if any, then you will answer special issues one — either special issue number one or two no."

I guess I would also incorporate in that same instruction that, "If ten of the jurors would find such evidence of mental illness mitigates against the imposition of the death penalty independent of the relevance of that evidence to the special issues, that they would then, in turn, answer special issues number one or two — and two, or either one of them no."

And I guess I would also add to that, "Regardless of what they feel like the answer to those special issues should, in fact, be."

And then in that same light I would request, I guess, a third interrogatory which asks them, "Do you find," or I

guess something that — "Do you find, or do you have a reasonable doubt, due to any evidence of Defendant's mental illness, if any, that the death penalty should not be imposed on this Defendant."

In other words, a third issue that gives them the opportunity to grant mercy, as it were, or to not give him the death penalty, even though they feel like the answers to special issues number one and two is yes. If they feel like there is mental illness, just like in Penry, they would find the Defendant was severely retarded, or any of the other information in this case concerning his background, deprivation, anything like that, that it gives them the option of giving effect to that type evidence by not giving him the death penalty, even though they feel like the answers to special issues number one and two is yes, because to the extent you don't do that, even though you allow the evidence into the record, it gives them no vehicle for expressing their opinion that his moral responsibility is not such that he ought to get the death penalty."

As Doctor Winslade said, to the extent that his free will had been diminished, that perhaps it would be inhuman to give the Defendant the death penalty, even though they found the offense was committed deliberately, and he will, indeed, pose a future danger with regard to criminal acts.

I think to the extent you don't allow the Jury to do that, it's in violation of the Eight Amendment, makes the death penalty arbitrary, capricious, cruel, unusual punishment. Violates the 14th Amendment and, specifically, in violation of what the Supreme Court said in Eddings versus Oklahoma, and what the opinion in Penry, the Fifth Circuit opinion in Penry would suggest is the same problem.

And we request whatever issues, instructions, interrogatories are necessary to give the Jury that option.

(Whereupon, an off the record discussion was held.)

THE COURT: Based on the objections made by the Defendant, the Court will change the paragraph relating to mitigation to read as follows: "In making these decisions, you are instructed that you can consider any evidence which, in your opinion, mitigates against an answer of yes to each issue, including any aspects of the Defendant's character, history, or mental illness, if any, and any of the circumstances of the commission of this offense which you find to be mitigating. And if such evidence causes you to have a reasonable doubt as to any issue, you are required to answer that issue no."

THE COURT: All other objections and requests for other issues to be added to the charge are denied.

ORIGINAL

No. 90-1770

Supreme Court, U.S.
FILED
JUN 3 1991
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

THE STATE OF TEXAS,
Petitioner

V.

TIMOTHY LANE GRIBBLE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THE EIGHTH AMENDMENT REQUIRES THE JURY TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE REGARDLESS OF WHETHER THE EVIDENCE PROVIDES A CAUSAL EXPLANATION FOR THE CRIME.

II. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY DECIDED THAT THE JURY DID NOT HAVE A VEHICLE FOR EXPRESSING ITS REASONED MORAL RESPONSE TO CONSTITUTIONALLY MITIGATING EVIDENCE OF TROUBLED CHILDHOOD, GOOD CHARACTER AND CHRONIC MENTAL INSTABILITY WHEN DECIDING WHETHER MR. GRIBBLE SHOULD LIVE OR DIE.

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No. ----------

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ON PETITION FOR A WRIT OF CERTIORARI
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RESPONDENT'S BRIEF IN OPPOSITION

I.

STATEMENT OF THE CASE

A. Statement of Facts

A concise statement of the mitigating evidence presented at Mr. Gribble's trial is set forth in the opinion of the Texas Court of Criminal Appeals:

> In the instant cause, testimony offered by appellant revealed a troubled and insecure childhood in which his mother was institutionalized for a severe mental illness and his father imprisoned for burglary. Only an infant at the time, appellant suffered greater mental and emotional hardship as a result of these traumatic events than did his

older siblings. During the first several years of his life, he and the other children were shuffled among relatives, never living in one place for very long.

After his parents were released from their respective confinements, appellant lived for a time with his mother. She had since divorced his father and remarried, living with her new husband and the children in a shack without running water somewhere in the mountains of Tennessee. Within a few months, appellant's step-father disappeared, leaving his mother pregnant and without food for the two youngest children. Unable to care for her family, appellant's mother spent much of her time in bars, often bringing strange men home at night. During his early formative years, there was no responsible adult figure in appellant's life.

Largely as a result of these circumstances, appellant's own mental and emotional condition was, and remained at the time of trial, abnormal. Doctor William Winslade, a psychoanalyst, testified that after much effort on his part he persuaded appellant to disclose to him that on two occasions appellant's mother had sexually abused appellant as a small child, requiring him to perform oral sex on her. Finally, Dr. Winslade opined that those experiences, even if they were untrue fantasies, provided a substantial explanation for the appellant's subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother. Dr. Winslade concluded that appellant developed a delusive fear of sexual domination, and that throughout his adult life this fear intermittently erupted into acts of violence, which appellant forced upon women that, in his fantasies, he feared they might force upon him. Invariably his victims were women with whom he was acquainted on a casual basis and, following his sexual assaults upon them, he customarily acted with incongruous, even bizarre, familiarity, more characteristic of an intimate encounter than a brutal attack.

That he was able to keep these sexual aberrations secret from his family and friends over an extended period of time evinces a personal recognition of his abnormalcy. Virtually all persons with whom he was acquainted, including his teachers, the customers at his natural father's service station, where he worked, his wife and ex-wife, and his siblings, regarded him as a stable, sensible, hardworking, polite, and generous. But at times his sexual fantasies became too great to resist, especially when he was under the influence of alcohol or other drugs. At such times, he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of

intense remorse.

Petitioner's Appendix A at A 20-22.

B. Disposition Below

Based on the facts presented in mitigation of a sentence of death, the Texas Court of Criminal Appeals concluded that the jury was unable to consider and give effect to this mitigating evidence. The Texas Court, therefore, reversed Mr. Gribble's conviction and sentence. See Id. The Court of Criminal Appeals denied the State's Motion for Rehearing. See Petitioner's Appendix B.

II.

REASONS FOR DENYING THE WRIT

A. THIS COURT IS WITHOUT JURISDICTION TO CONSIDER THE PROPOSED QUESTIONS BECAUSE THEY WERE NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

None of the claims presented here were presented to the Court below. Therefore, none are appropriately before this Court. The State presents three questions on which it asks this Court to grant certiorari: whether character and background evidence must relate to the accused's culpability for the crime and capacity for rehabilitation before the evidence is mitigating under the Eighth Amendment; whether the first special issue under the Texas capital punishment sentencing scheme was sufficient for the jury to consider what the State views as Mr. Gribble's only piece of mitigating evidence; and, whether character and background evidence is mitigating if the crime cannot be

attributed to the evidence.

On direct appeal, the State advanced none of these arguments. Instead, it argued that Mr. Gribble was not entitled to additional jury instructions all of his mitigating evidence could be considered within the two special issues. The State's entire argument was framed by its perception of the requirements of Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Acknowledging that Mr. Gribble's evidence regarding his troubled childhood, good character, and chronic mental instability was constitutionally mitigating, the State argued that "these types of factors fit easily -- just as they always have -- into the jury's deliberations on the two special issues."[1]

The arguments presented by the State here were not presented on direct appeal. Indeed, the arguments advanced here are the opposite of the arguments made on direct appeal. On direct appeal the State conceded that Mr. Gribble's evidence was constitutionally mitigating and argued only that it could be considered within the special issues. Here, in contrast, the State argues that virtually none of Mr. Gribble's evidence is even mitigating.

To address any of the State's claims would be antithetical to the fundamental policy of refusing to review federal questions unless they have been both raised and decided in the court below. See, e.g., Heath v. Alabama, 474 U.S. 82, 87 (1985); Illinois v.

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[1] The relevant portion of the State's brief on direct appeal is attached as Appendix A.

Gates, 462 U.S. 213, 218-22 (1983); Tacon v. Arizona, 410 U.S. 351, 352 (1973); Hill v. California, 401 U.S. 797, 805-06 (1971); Cardinale v. Louisiana, 394 U.S. 437-39 (1969) (federal question not raised and decided below defeats Supreme Court jurisdiction). Even assuming that a federal question is derivative of a ground raised on direct appeal,

> [w]hen the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.

Board of Directors of Rotary Int'l v. Rotary Club, 431 U.S. 537, 550 (1987) and cases cited therein. Absent an opportunity for the state court to address the State's new claims as to whether Mr. Gribble's evidence was mitigating in the first place, certiorari review would be improper.

In an apparent attempt to create a jurisdictional basis for this Court to review the lower court's ruling, the Attorney General, on a motion for rehearing, asserted the claims it now presents in its petition for certiorari. This does not satisfy the requirement of initial state court review of claims not raised on appeal. The Court of Criminal Appeals will not entertain a motion for rehearing which "belatedly present[s] new grounds in a piecemeal fashion" because it is "inimical to the rights of an opposing party and valid interests of this Court in orderly procedure and judicial economy." Gambill v. State, 692 S.W.2d 105, 106 (Tex. Crim. App. 1985). Accordingly, the Court of Criminal Appeals' summary denial of rehearing in Gribble

indicates that the motion was not entertained by the state court in a manner adequate to invoke this Court's consideration of the claims now raised.

Presenting a federal question for the first time in a motion for rehearing addressed to the highest state court is insufficient to invoke Supreme Court jurisdiction unless the court below actually entertains the petition and expressly decides the motion. Radio Station WOW v. Johnson, 326 U.S. 120, 128 (1945); Hanson v. Deckla, 357 U.S. 235, 243-44 (1958); Herndon v. Georgia, 295 U.S. 441, 443 (1935); American Surety Co. v. Baldwin, 287 U.S. 156 (1932); Forbes v. State Council, 216 U.S. 396 (1910); Simmerman v. Nebraska, 116 U.S. 54 (1885). To merit certiorari review, the order denying the motion for rehearing must be more than a cursory recitation that the motion has been considered and then denied; there must be language in the order that in some way reflects that the court "exerted its jurisdiction in such a way that the case could have been brought here had the questions been raised prior to the original disposition." Radio Station WOW, 326 U.S. at 128; Hathorn v. Lovorn, 457 U.S. 255, 265 n.15 (1982). Because the Court of Criminal Appeals denied the State's motion for rehearing without comment (see Petitioner's Appendix B), the State cannot rely on that motion as a predicate to this Court's certiorari jurisdiction.

B. THE QUESTIONS SUGGESTED FOR REVIEW PRESENT NO SPECIAL OR IMPORTANT ISSUES.

Rule 10 of the Supreme Court Rules provides that review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only on a showing of "special and important reasons." To merit certiorari review, the reasons advanced by petitioner must relate to problems "beyond the academic and episodic." Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 74 (1955).

In its opinion below, the Texas Court applied Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989), to qualitatively similar mitigating facts, i.e., facts to which the jury could not fully consider and or to which it could give effect under the court's charge. The Texas Court held than, as in penry, Mr. Gribble's conviction and sentence had to be reversed. Essentially, all the State now asks is that this Court ignore the lower court's findings of fact and reach a different result. This does not constitute a special or important reason to justify this Court's imposition of its certiorari jurisdiction, and none exist.

C. WHETHER THE EIGHTH AMENDMENT REQUIRES THE JURY TO CONSIDER AND GIVE EFFECT TO MITIGATING EVIDENCE REGARDLESS OF WHETHER THE EVIDENCE PROVIDES A CAUSAL EXPLANATION FOR THE CRIME.

In Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 316 (1990) this Court confirmed that constitutional mitigating evidence is not limited to crime related evidence, or evidence showing a potential for rehabilitation. In Boyde, this Court upheld the

California capital punishment jury instructions precisely because they did not preclude the jury's consideration of mitigating evidence that was not linked to the commission of the crime:

> Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in [the statute] allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When [the challenged instruction] is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

Id. at 331 (emphasis added).[2]

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[2] Boyde, therefore contradicts, rather than supports, the State's restrictive view of mitigating evidence. Contrary to the State's argument, no confusion has ever existed regarding the nature of constitutionally mitigating evidence, and the State's reliance on California v. Brown, 479 U.S. 538 (1987) (O'Connor concurring) is misplaced. To the extent that Brown's language suggests that, in order to be mitigating, the crime had to be attributable to the defendant's background and character, Boyde clarifies this language. In Boyde, this Court held that the evidence of impoverished and deprived childhood, inadequacies as a student and strength of character was mitigating evidence which the jury was "directed to consider" in the context of an instruction regarding "any other circumstance that might excuse the crime." 108 L.Ed.2d at 330 (emphasis in original). Although this evidence did not link the defendant's commission of the crime to his background and character, it was still constitutionally mitigating.

Nonetheless, the State still attempts to backtrack from Penry and Boyde by relying on Justice O'Connor's concurrence in Brown. The State alleges that Justice O'Connor only regards a defendant's background and character as constitutionally relevant when it "pertains to an aspect of a defendant's character or background that society views as rendering him less culpable for the crime" and when a "nexus" exists between the evidence and the crime. Petition at 20. In addition to this Court's holding in Boyde, Justice O'Connor's own remarks in South Carolina v. Gathers, reveal the flaws of the State's attempt:

(continued...)

The petitioner in Boyde contended that "none of the 11 statutory factors in [the California sentencing statute] allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death." Id. at 330. The Court rejected Boyde's claim because it determined that the jury could consider non-crime-related mitigating evidence under the challenged instruction, not because the non-crime-related evidence itself was not constitutionally protected. Respondent's selective citation of footnotes[3] should not distract this Court from its

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[2](...continued)

> Our decisions in Lockett and Eddings were based on the proposition that the decision of the capital sentencer is a profoundly moral one. . . . Evidence extraneous to the crime itself is deemed relevant and indeed, constitutionally so. . . . In this case, the sentencing jury heard testimony from [the defendant's] mother, his sister, and his cousin, all indicating that he was an affectionate and caring person. Gathers' sixth grade teacher testified that he was a quiet and affectionate child. . . . None of this evidence was directly relevant to the events of September 13, 1986, but all of it was relevant to the jury's assessment of the defendant and his moral blameworthiness.

___ U.S. ___, ___; 109 S.Ct. 2207, 2214 (1989) (O'Connor, J., dissenting on other grounds) (emphasis added).

[3] For example, the State claims that Boyde, at n.5, limits non-crime-related mitigating evidence to good character evidence. Petition at 20 n.5. Footnote five says no such thing. This Court's point in footnote five was to explain that through the catch-all mitigation instruction the jury could consider and give effect to good character evidence. By any rational view, this does not limit the constitutional dimensions of non-crime-related mitigating evidence. Rather, it merely recognizes that this type of evidence, like other constitutionally protected mitigating evidence unrelated to the crime, could be considered under the California jury instructions. As the Court of Criminal (continued...)

holding in Boyde: the California statute was constitutional because it provided the jury what the Texas statute does not -- a vehicle for considering and giving full effect to all mitigating evidence, both crime-related and non-crime-related.[4]

Skipper v. South Carolina, 476 U.S. 1 (1986), also illustrates this broad conception of constitutionally mitigation evidence. Skipper held that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature [mitigating evidence] relevant to the sentencing determination." 476 U.S. at 7. Such evidence does not render the defendant less morally culpable for his crime, nor does it have any imaginable nexus

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[3](...continued)
Appeals recognized in Gribble, Mr. Gribble's jury did not have that opportunity in the first place. See infra at ___.

[4] Saffle v. Parks, ___ U.S. ___ (1990), 108 L.Ed.2d 415 (1990) offers no support to the State's articulation of mitigating evidence. In Saffle this Court held that a claim instructing the jury to avoid the influence of sympathy was barred by Teague v. Lane, 489 U.S. ___, 106 L.Ed.2d (1989). In reaching this holding the Court affirmed that "Lockett and Eddings command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision." Saffle, 108 L.Ed.2d at 426.

Saffle does not, as the State would have it, stand for the proposition that if the jury is permitted to consider any mitigating evidence, it creates a risk that the jury decision will be based on mere sympathy. Rather, Saffle holds that the dictates of Lockett and Eddings do not require the jury to be allowed to base its decision on mere sympathy. Saffle recognizes, once again, that the jury must be able to consider, weigh, and give effect to all of the mitigating evidence that the defendant puts before the jury. Id. at 426. See also and compare Penry, 106 L.Ed.2d at 284 ("Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime.").

with the crime itself. Nonetheless, the Court recognized that

> Although it is true that [prison adjustment] ... would not relate specifically to petitioner's culpability for the crime he committed, see Koon I, supra, 278 S.C., at 536, 298 S.E.2d, at 774, there is no question but that such [evidence] ... would be "mitigating" in the sense that [it] might serve "as a basis for a sentence less than death." Lockett, supra, 438 U.S. at 604, 98 S.Ct. at 2965.

Id. at 4-5. The Court acknowledged that evidence of successful adjustment to prison life is mitigating not only because it militates against a finding of future dangerousness, but also because it shows that the defendant "could lead a useful life behind bars if sentenced to life imprisonment." Id. at 7 (emphasis added). This Court nevertheless held that such evidence is constitutionally mitigating and that the sentencer must consider it, because it informs the decision required by the Eighth Amendment whether death is the appropriate sentence for such a defendant. Skipper, 476 U.S. at 4-5, 7-8. Skipper, therefore, squarely forecloses Petitioner's argument.

Boyde and Skipper flow from a firmly established line of cases beginning with Woodson v. North Carolina, 428 U.S. 280 (1976), in which this Court has affirmed the broad constitutional parameters of mitigating evidence. The State's attempt to create a conflict among these decisions, or a "confusion engendered by Penry v. Lynaugh," Petition at 17, is nothing more than an attempt to apply an unjustifiably, and unconstitutionally, narrow definition of mitigating evidence.[5] Each of the State's reasons

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[5] The State's fixation on the concepts of "personal culpability for the crime" and "potential for rehabilitation" (continued...)

for granting the writ is infected by its argument that the Eighth Amendment protects only a narrow set of mitigating evidence which shows personal culpability for the crime or a potential for rehabilitation. This position reveals a fundamental misunderstanding of the Eighth Amendment principles consistently applied by this Court.

In an uninterrupted line of cases, this Court has steadfastly refused to permit constitutional limitations on the presentation and consideration of mitigating evidence at the sentencing phase of a capital trial. See Gregg v. Georgia, 428 U.S. 153 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633 (1977); Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v.

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[5](...continued)
stems, most accurately, from a desire to ignore the import of Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Both concepts betray themselves as mere cognates for the operative terms of the Texas special issues. With respect to the first special issue, "personal culpability for the crime" stands in for "deliberately," while in the second special issue, "potential for rehabilitation" substitutes for future dangerousness. Under this crabbed view, if mitigating evidence must relate to one of these factors, then all mitigating evidence can be considered within the scope of the special issues. This Court's holding in Penry, therefore, would be superfluous. Even the Texas Legislature has recognized the fallacy of this view -- in May 1991 the legislature adopted, and sent to the governor, a new capital punishment scheme which modifies the special issue questions by adding a third question: "Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without the possibility of parole rather than a death sentence be imposed." A copy of the Senate Bill No. 880 is attached as Appendix B.

Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Sumner v. Shuman, 483 U.S. 66 (1987); McCleskey v. Kemp, 481 U.S. 279 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Franklin v. Lynaugh, 487 U.S. 164 (1988); Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989); McKoy v. North Carolina, 494 U.S. ___, 108 L.Ed.2d 369 (1990); Boyde v. California, 494 U.S. ___, 108 L.Ed.2d 316 (1990).

This Court has based the constitutional requirement of individualized sentencing on the indisputable fact that the consequences of the jury's momentous decision in a capital case are profoundly different than in a non-capital one. Woodson, 428 U.S. at 303-304. The Court has emphasized "what cannot fairly be denied" -- the insight that "death is a punishment different from all other sanctions in kind rather than degree." Id. (emphasis added; citing Furman v. Georgia, 408 U.S. 238, 286-291 (1972)). A more detailed examination of the Court's explanation illustrates this bedrock principle:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson, 428 U.S. at 304 (emphasis added).

This passage makes apparent that this Court in Woodson did not mandate individualized sentencing because it comports with

traditional aims of sentencing generally in non-capital cases. On the contrary, this Court emphasized that the "ultimate" nature of the penalty required that the jury weigh all aspects of the defendant's character and record so that it might determine whether this "uniquely individual" human being should be put to death.

Moreover, this Court's use of the disjunctive in its description of potentially mitigating evidence was no accident. This Court did not hold that "the relevant facets of the character and record of the individual offender" had to be tied in any way to the defendant's personal culpability for the crime in order to mitigate against the imposition of death. On the contrary, in Woodson this Court specifically rejected any such requirement:

> Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development [citations omitted]. While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see Trop v. Dulles, 356 U.S. at 100, 2 L.Ed.2d 630, 78 S.Ct. 590 (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

Id. This Court held that "[c]onsideration of both the offender and the offense" is constitutionally required before the death penalty may be imposed. By this distinction, the Court intended that the jury consider both the circumstances of the offense (including the relationship between any mitigating evidence and

the commission of the offense) and the character and record of the individual offender (exclusive of the relationship, if any, between this evidence and the commission of the offense) before it may condemn the offender to die. Any other process would require the jury to ignore "the diverse frailties of humankind." Id. Woodson, itself, demonstrates that any claim that all constitutionally mitigating evidence must reflect reduced personal culpability for the capital murder is flatly wrong.

A year after Woodson, this Court emphasized this identical distinction between mitigating evidence which is relevant to the crime and that which is relevant to the individual defendant's character, holding again that neither could be excluded from the jury's consideration. Roberts (Harry) v. Louisiana, 431 U.S. 633, 637 (1977). Striking down a mandatory death penalty for persons convicted of murdering police officers, the Court repeated that "it is essential that the capital-sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Id. The Court's "either-or" analysis of mitigation in Roberts reaffirmed its opinion in Woodson, and refutes any argument that mitigating evidence must be tied to the commission of the crime.

Having established the requirement of individualized sentencing in Woodson and endorsed that principle again in Roberts (Harry), this Court in 1978 rejected once and for all the claim that a State could limit the presentation and consideration

of constitutionally mitigating evidence in a capital case. Lockett v. Ohio, 438 U.S. 586 (1978). Lockett invalidated an Ohio statute that limited the mitigating circumstances a jury could consider in deciding whether a defendant convicted of capital murder should suffer death. 438 U.S. at 607-609. This Court emphasized again that its holding in Woodson that "the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense" "rested 'on the predicate that the penalty of death is qualitatively different' from any other sentence." Lockett, 438 U.S. at 604 (citations omitted).[6] The Court explicitly concluded "that the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case,[7] not

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[6] The Court stressed that "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases [due to the] nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence. . . ," and concluded that precluding the sentencer "from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S. at 605 (emphasis added).

[7] In Lockett, the Court reserved judgment whether a mandatory death sentence constitutionally might be imposed on prisoners or escapees convicted of murder committed while serving a life sentence. See Lockett, 438 U.S. at 604 n.11. This question was subsequently resolved in the negative. Sumner v. Shuman, 483 U.S. 66 (1987).

be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. (emphasis added in part).

It is not the possible relationship between mitigating circumstances and the capital offense that demands that the jury consider it in passing sentence; instead, it is the nature of the "ultimate" penalty and the "fundamental respect for humanity underlying the Eighth Amendment" that require that mitigating evidence be heard and considered. To vindicate that fundamental respect for humanity, the Constitution requires the sentencer to consider all the aspects of an individual's character, whether or not that evidence is also related to the commission of a capital offense. As this Court recognized,

> [I]n noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes . . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases [to satisfy the Eighth Amendment].

Lockett, 438 U.S. at 604-605.

Since this Court articulated the constitutional requirement of a broad conception of mitigating evidence in Lockett, it has uniformly reaffirmed that formulation. This unbroken line of decisions demonstrates that a defendant need not establish any "nexus" between his mitigating evidence and the commission of the capital offense before he is entitled to have the sentencer consider it in passing sentence. Instead, the jury must be

permitted to consider and give effect to any mitigating circumstance that might reasonably persuade it to decline to impose a sentence of death.

In Sumner v. Shuman, the Court reaffirmed the Eighth Amendment requirement of individualized sentencing in capital cases that it had recognized in Woodson and elaborated in Lockett. Shuman, 483 U.S. 66 (1987). Shuman struck down a Nevada statute mandating that any life-term inmate convicted of committing murder during that life term be sentenced to death without further inquiry. 483 U.S. at 78. The Court traced its capital sentencing jurisprudence from Gregg v. Georgia, 428 U.S. 153 (1976) forward and concluded that constitutional capital sentencing schemes must permit "the sentencing authority to consider relevant mitigating circumstances pertaining to the offense and a range of factors about the defendant as an individual," no matter how aggravated the homicide. Shuman, 483 U.S. at 74 (emphasis added). This phrase highlights the flaw in the claim that mitigating evidence must be tied to the capital offense and render the defendant less morally culpable than any other citizen. On the contrary, Shuman demonstrates that the Eighth Amendment's requirement of individualized sentencing continues to be grounded in fundamental respect for the lives of individual human beings, rather than on some vague degree of causal relationship between the mitigating evidence and the capital offense.

This Court has summarized the central commands of its Eighth

Amendment capital sentencing jurisprudence since Gregg as follows:

> In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence. . . . [a State] cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty.

McCleskey v. Kemp, 481 U.S. 279, 304, 306 (1987) (emphasis in original in part and supplied in part). In other words, the Constitution requires that a State meaningfully narrow the class of convicted murderers eligible for the death penalty, but forbids the State from limiting in any manner whatsoever the sentencer's consideration of "any relevant circumstance that could cause it to decline to impose" a sentence of death on those so convicted. Id; see also 481 U.S. at 367 (Stevens, J., dissenting); Zant v. Stephens, 462 U.S. 862, 870-872 (1983) (approving Georgia statutory scheme conferring "absolute discretion [on] the factfinder" not to impose death after the eligibility of the defendant for a death sentence has been established by the finding of aggravating circumstances).

In 1989 this Court applied its long held understanding of the broad constitutional dimensions of mitigating evidence to the Texas capital punishment statute. Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989). Penry reaffirmed the Eighth Amendment principle that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's

background, character, or the circumstances of the crime" in determining the appropriateness of a death sentence. 106 L.Ed.2d at 284. Accordingly, Penry held the Texas statute unconstitutional, as applied, if a rational juror, in answering the special issues, could not give "full consideration to evidence that mitigates against the death penalty." Id. This Court held that it was constitutionally necessary for jurors to be given a "vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence." Id. at 283.

Contrary to the teaching of this Court, from Woodson to Boyde, the State is trying to do exactly what it cannot: prevent the jury from giving effet to constitutionally protected mitigating evidence. Moreover, it is seeking to enlist this Court in its efforts, despite the repeatedly and firmly expressed opinion of this Court that the jury in a capital case may not be so restricted. Certiorari should be denied.

D. THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY DECIDED THAT THE JURY DID NOT HAVE A VEHICLE FOR EXPRESSING ITS REASONED MORAL RESPONSE TO CONSTITUTIONALLY MITIGATING EVIDENCE OF TROUBLED CHILDHOOD, GOOD CHARACTER AND CHRONIC MENTAL INSTABILITY WHEN DECIDING WHETHER MR. GRIBBLE SHOULD LIVE OR DIE.

The Texas Court of Criminal Appeals fully considered and correctly applied this Court's holding in Penry v. Lynaugh, 492 U.S. ___, 106 L.Ed.2d 256 (1989) to the particular facts of Mr. Gribble's case. To reach its desired result, the State would have this Court rewrite the facts and apply an unconstitutional definition of mitigating evidence. Because the Texas Court correctly held that the jury did not have a vehicle for expressing its reasoned moral response to constitutionally mitigating evidence of troubled childhood, character and mental instability, certiorari should not be granted.

In Penry, this Court recognized that in certain cases, the Texas capital punishment special issue questions unconstitutionally preclude jurors from considering and giving effect to mitigating evidence. Given that the Eighth Amendment requires that a capital sentencing jury may not be precluded "'from considering any aspect of the defendant's character or any circumstance of his offense as an independently mitigating factor,'" Penry, 106 L.Ed.2d at 277 (quoting Lockett v. Ohio, 438 U.S. at 607) (emphasis supplied), the Constitution demands that the jury have a vehicle for giving effect to mitigating evidence "by declining to impose the death penalty." Penry, 106 L.Ed.2d at 284.

Penry invalidated the death sentence of a defendant whose

mitigating evidence included mental retardation and child abuse. At sentencing, Penry's jury answered the two standard special issue questions: one on "deliberateness" and another on future dangerousness.[8] This Court held that the inherent limitations of the "special issues" precluded jurors from considering and giving full mitigating effect to the particular evidence in Penry's case.

In analyzing whether the first special issue allowed full consideration of Penry's mitigating evidence, this Court acknowledged that his evidence of child abuse and mental retardation was relevant to "whether he was capable of acting 'deliberately'" Id. at 280. The Court, however, recognized that the relevance of this evidence to Penry's sentence was not exhausted by its relevance to his "deliberateness;" that is, the evidence "had relevance to [his] moral culpability beyond the scope of the [first question]." Id.

As the Court explained, the first special issue did not permit full consideration of Penry's mitigating evidence because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately.'" Id. In fact, the very nature

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[8] Under Art. 37.071(b)(1) and (b)(2), the two special issues require the jury to determine: (1) "[W]hether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; and (2) "[W]hether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The jury in Penry also answered the third special issue regarding the provocation of the deceased. The third special issue was not presented to the jury in this case.

of the first special issue demonstrates why it cannot fully measure a defendant's culpability. Under Texas law, the first special issue requires the jury to find only a "moment of deliberation and the determination on the part of the actor to kill." Cannon v. State, 691 S.W.2d 664, 677 (Tex. Crim. App. 1985). The first special issue thus focuses solely on the defendant's mens rea at a single instant in time: it requires the jurors to inquire only whether, as a matter of fact, deliberation occurred.

Because the first issue focuses only on the fact of deliberation, it precludes jurors from considering many other mitigating factors which may have influenced or preceded that fact of deliberation. For example, in answering this special issue, jurors cannot consider potentially mitigating explanations regarding why the defendant acted deliberately e.g., that his ability to judge the consequences of his actions was temporarily, though perhaps not completely, impaired. Nor, in answering this special issue, can jurors consider whether the defendant was able to control his impulses. In sum, as this Court recognized in Penry, even if a defendant acts "deliberately," he may still be less culpable (and less deserving of death) because some mitigating fact explains that deliberate act.

This Court acknowledged that Penry's evidence of retardation and child abuse lessened his culpability because it indicated he was "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct." Id. at 281. The

Court concluded that the narrow focus of the first special issue precluded jurors from giving Penry's evidence full mitigating effect. The first special issue precluded a rational juror from giving a life sentence, even though that juror could have concluded a life sentence was the "reasoned moral response" to Penry and his evidence:

> [A] juror who believed that Penry's ... background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' Thus, we cannot be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence.

Id. The Court held that this preclusive effect violated the Eighth Amendment.

In evaluating whether the second special issue allowed full consideration of Penry's evidence, this Court observed that Penry's retardation and abused childhood was "relevant only as an aggravating factor" because it compelled "a 'yes' answer to the question of future dangerousness." Id. at 281 (emphasis in original). The Court explained that the second special issue prevented jurors from considering Mr. Penry's evidence as mitigating evidence:

> Penry's . . . history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future . . . . The second special issue, therefore, did not provide a vehicle for the jury to give mitigating effect to Penry's evidence . . . .

Id. See also Zant v. Stephens, 462 U.S. 862, 885 (1983) (constitution forbids State to convert mitigating evidence into

aggravating evidence).

Penry reaffirms the longstanding Eighth Amendment principle that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime" in determining the appropriateness of a death sentence. 106 L.Ed.2d at 284. Accordingly, Penry holds the Texas statute unconstitutional, as applied, if a rational juror, in answering the special issues, could not give "full consideration of evidence that mitigates against the death penalty." Id. The jurors must be given a "vehicle for expressing the view that [the defendant] did not deserve to be sentenced to death based upon his mitigating evidence." Id. at 283. In such cases, Penry requires "instructions informing the jury that it [may] consider and give effect to the mitigating evidence . . . by declining to impose the death penalty." Id. at 284. (emphasis supplied).[9]

The Texas Court of Criminal Appeals correctly applied Penry to Mr. Gribble's mitigating evidence. In the court's words:

> [A]t least whenever a capital defendant produces evidence of his own character, background, or the circumstances surrounding his offense which, according to contemporary social standards, has a tendency to reduce his moral culpability in a way not exclusively related to the deliberateness of his criminal conduct, the provocative

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[9] As the Court explained, the Constitution mandates that jurors be given wide latitude in giving effect to their conclusion that a defendant ought not be executed. "Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character, and crime." Id. at 284.

> behavior of his victim, or the probability of his future dangerousness, the United States Constitution forbids imposition of the death penalty upon him by a sentence given no means to prescribe, based on such mitigating evidence, a less severe punishment.

Opinion of Court of Criminal Appeals, Petitioner's Appendix A at A-20.

As the Texas Court found, the testimony at trial revealed a troubled and insecure childhood racked by poverty and scarred by absent and delinquent or emotionally unstable parents. Supra at 2-3. This included a mother, who, when she was present, sexually abused her young son, requiring him to perform oral sex on her. Id. As the Court concluded, "During his formative years, there was no responsible adult figure in [Mr. Gribble's] life." Id.

Mr. Gribble's mitigating evidence was not limited to his childhood experiences but extended to the effects on him as an adult. The Court continued, "largely as a result of these circumstances, [Mr. Gribble's] own mental and emotional condition was, and remained at the time of trial, abnormal." Id. A psychoanalyst explained, "those experiences, even if they were untrue fantasies, provided a substantial explanation for [Mr. Gribble's] subsequent history of violence, and how the contrast of his violent behavior with his positive personality traits were indicative of severe mental illness, depression, and psychotic illusions of the kind experienced by his mother." Id.[10]

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[10] Even if, as the State argues, a nexus is required between the mitigating evidence and the commission of the crime, the facts found by the Texas Court regarding the psychiatrist's explanation of Mr. Gribble's history, provides that connection. (continued...)

> Despite his debilitating childhood, and his own personal recognition of his abnormalcy[,] [v]irtually all persons with whom he was acquainted, including his teachers, the customers at his natural father's service station, where he worked, his wife and ex-wife, and his siblings, regarded him as a stable, sensible, hardworking, polite, and generous. But at times his sexual fantasies became too great to resist, especially when he was under the influence of alcohol or other drugs. At such times, he suffered from a true psychosis in which episodes of violent criminal behavior were typically followed by feelings of intense remorse.

Id.

The Texas Court recognized this multi-dimensional mitigating evidence of troubled childhood, good character and mental instability, as "redeeming personality traits or factors which tend to ameliorate fault." Id. "As such, the sentencer in a capital proceeding must be authorized to mitigate punishment if it finds that a defendant's personal culpability was thereby reduced." Id. The Court held, therefore, that "absent some functionally equivalent instructive device [to the court's charge], that the jury could consider and give effect to the mitigating circumstances, the jury was not afforded the opportunity to express its judgment whether [Mr. Gribble], even if likely to be a continuing threat to society, should receive the death sentence." Id.

To escape the decision by the Texas Court, which faithfully applied Penry to the mitigating facts of this case, the State

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[10](...continued)
The State does not contest the accuracy of these facts, nor can it because the Texas Court's findings of fact may not be overruled unless clearly erroneous, which they are not.

would have this Court rewrite the facts as found be the court below. First, it claims that the only mitigating evidence this could should consider is that of an "inability to control his fantasies, thoughts and fears." Petition at 21. Second, it baldly asserts that the Court of Criminal Appeals "mischaracterized" the evidence of Mr. Gribble's childhood. Petition at 26.

This Court does not grant certiorari to "review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1925). The findings of mitigating facts by the Texas Court are fully supported by the record and therefore, this Court should reject the State's attempt to have them rewritten. Simply because the State does not like the findings of fact made by the Texas court does not provide a reason to grant certiorari.

The State's argument -- that the only constitutionally relevant mitigating evidence is that of an inability to control fantasies, thought and fears all of which could be considered within the scope of special issue one -- stems from a faulty premise. The premise is that constitutionally mitigating evidence must be relevant to personal culpability for the crime or the potential for rehabilitation. The fallacy of that view is demonstrated not only by this Court's statements regarding the constitutional scope of mitigating evidence, see supra at ___ - ___, but also by the specific evidence held to be constitutionally protected mitigating evidence in each of those cases. See, e.g., Lockett v. Ohio, 438 U.S. 586, 604 (1978)

(plurality opinion) (mitigating factors include character, absence of prior record, youth, low intelligence, and drug rehabilitation); Eddings v. Oklahoma, 455 U.S. 104, 113-116 (1982) (evidence of "difficult family history," "turbulent family history," "beatings," "youth," and "depriv[ation] of the care, concern, and paternal attention that children deserve" all mitigating under the Eighth Amendment); Skipper, 476 U.S. 1 (1986) (adjusting well to prison life constitutionally mitigating evidence relevant to dangerousness and ability to lead useful life behind bars); California v. Brown, 479 U.S. 538 (1987) (evidence of "disadvantaged background" constitutionally mitigating); Hitchcock v. Dugger, 481 U.S. 393, 397 (1987) (evidence of impoverished childhood, early death of father, youth and "the difficult circumstances of [the defendant's] upbringing," all constitutionally mitigating); Burger v. Kemp, 483 U.S. 776, 97 L.Ed.2d 638, 654 (1987) ("unhappy and unstable childhood," characterized by a succession of stepfathers who resented the defendant and a mother who failed to supervise or care for the defendant, constitutionally mitigating); Boyde, 108 L.Ed.2d at 330 (jury instructions allowed consideration of mitigating evidence of "impoverished and deprived childhood, inadequacies as a school student, strength of character in face of these obstacles"). If the State's analysis of what constitutes mitigating evidence within the Eighth Amendment is accepted, then all of this Court's precedents are wrong.

An accurate analysis of the mitigating facts of troubled

childhood, good character and chronic mental instability, as found by the Texas Court, supports the Court's conclusion that the jury could not fully consider and give effect to the evidence under the special issues. Under the first special issue, Mr. Gribble's mitigating evidence was either irrelevant to the jury's inquiry, see Franklin v. Lynaugh, 487 U.S. 164, 101 L.Ed.2d 155 (1988), or had relevance beyond its scope, as in Penry. Like Penry's mental retardation, Mr. Gribble's troubled childhood and chronic mental instability may have been relevant to whether he was capable of acting "deliberately." Penry, 106 L.Ed.2d at 280-281. Yet, even if a juror considered Mr. Gribble's troubled childhood or chronic mental instability and found that he acted deliberately, that juror could also believe that, based on that same evidence, Mr. Gribble was, nonetheless, less morally culpable that a defendant who had no such excuse.[11]

Under the special issues, that juror had no vehicle to express a reasoned moral response to the evidence of troubled

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[11] Evidence from the guilt/innocence phase, cited to by the State as irrelevant to the jury's punishment phase decision, actually further highlights the jury's dilemma. According to the State, Dr. Silverman testified that Mr. Gribble's "psychotic illness, history of sexual conflicts and difficulty controlling his impulses caused Gribble to act in an 'automated' fashion." Petition at 22. The State contends that because the jury rejected this evidence at the guilt/innocence phase the only way it could consider the evidence at the punishment phase was as residual doubt. This is a specious argument. Indeed, in Penry, the mitigating evidence of mental retardation was introduced at the guilt/innocence phase. See Penry, 106 L.Ed.2d at 271. It is self-evident that although the jury may have found that Mr. Gribble acted intentionally and deliberately, this evidence may have still caused them to believe that he was not morally culpable or deserving of death.

childhood and chronic mental instability. The additional instructions given in this case did not cure the constitutional infirmity of Mr. Gribble's sentence. The definition of deliberately supplied to the jury merely informed it that deliberately was more than intentional. As this Court held in Penry, "Assuming . . . that the jurors in this case understood 'deliberately' to mean something more than that [Mr. Gribble] was guilty of 'intentionally' committing murder, those jurors may still have been unable to give effect to [Gribble's] mitigating evidence in answering special issue one." 106 L.Ed.2d at 280. The alleged mitigation instruction fairs no better as a constitutional matter because it only told the jury to consider the mitigating quality of the evidence as applied to the two special issues. Thus, the jury had no vehicle to express its reasoned moral response to the mitigating evidence outside the scope of the special issues.[12]

This situation is precisely the same one condemned by this Court in Penry: the jury's inquiry into Mr. Gribble's personal moral culpability for his offense was foreclosed once they determined he acted "deliberately." Because "personal culpability is not solely a function of a defendant's capacity to act 'deliberately,'" however, the first special issue precluded

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[12] Because the jury could not give effect to the constitutionally mitigating evidence, it is axiomatic that "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde, 108 L.Ed.2d at 329.

the jury from considering or giving full mitigating effect to Mr. Gribble's evidence of a troubled childhood and chronic mental instability. Penry, 492 U.S. at ___, 106 L.Ed.2d at 280. As a consequence, there is a constitutionally unacceptable risk that Mr. Gribble received his death sentence "in spite of factors [calling] for a less severe penalty." Penry, 492 U.S. at ___, 106 L.Ed.2d at 281 (citing Lockett, 438 U.S. at 605). See also Eddings, 455 U.S. at 115-119.

Similarly, Mr. Gribble's mitigating evidence of good character, though unquestionably mitigating, was wholly irrelevant to the first special issue question.[13] As the Court anticipated in Franklin, this evidence, like "voluntary service, kindness to others, or religious devotion," was relevant to Mr. Gribble's moral culpability but had nothing to do with the "deliberateness" of his offense. 101 L.Ed.2d at 173. Because of the straightjacket imposed by the first special issue question, the jury's decision whether death was the appropriate punishment for Mr. Gribble could not be informed by this mitigating evidence, in violation of the principles of Lockett, Eddings, Penry, and Boyde.

Mr. Gribble's mitigating evidence could do him no more good under the second special issue. Again, just like Penry's evidence of mental retardation and childhood abuse, Mr. Gribble's evidence of a troubled childhood and chronic mental instability could not be given any mitigating weight under the second

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[13] See also n. 3, supra.

question. See Penry, 492 U.S. at ___, 106 L.Ed.2d at 281. As a consequence of Mr. Gribble's troubled childhood and chronic mental instability a juror could rationally find him "less able than a normal adult to control his impulses or to evaluate the consequences of his actions." Id. Indeed, the Texas Court found that when Mr. Gribble's sexual fantasies became to great too resist he experienced a psychosis in which episodes of violent criminal behavior occurred. Statement of Facts, supra at 2. These qualities compel an attendant finding that Mr. Gribble is likely to be dangerous again in the future -- requiring the jury to return an affirmative answer and the court to impose a sentence of death.[14]

The focus of the second special issue precluded the jury from considering and giving effect to Mr. Gribble's troubled childhood and chronic mental instability as those "compassionate or mitigating factors stemming from the diverse frailties of humankind" which may reasonably support a life sentence. Woodson v. North Carolina, 428 U.S. 286, 304 (1976). Instead, the Texas statute turned these compassionate factors about Mr. Gribble into aggravating factors supporting only a sentence of death. Like Penry's evidence of mental retardation and childhood abuse, Mr. Gribble's evidence of troubled childhood and chronic mental

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[14] The State's only nod to the existence of special issue two is to state, without explanation, that the mitigating evidence was not two edged and could be considered within special issue one. Petition at 22. The State asks too much of this Court to not concede that the jury would find chronic mental instability and psychosis aggravating under the second special issue.

instability was a "two-edged sword:" it "[diminished] his blameworthiness for his crime even as it [indicated a probability] that he [would] be dangerous in the future." Penry, 492 U.S. at ___, 106 L.Ed.2d at 281. Because of the preclusive effect of the Texas statute, only the aggravating "edge" of Mr. Gribble's evidence could be given effect by the jury.[15]

Mr. Gribble's other mitigating evidence, demonstrating his good character, likewise could not be given mitigating weight under the second special issue. These facts about Mr. Gribble's character and background, though constitutionally protected, were not relevant to the jury's determination whether he was likely to commit some criminal act of violence in the future. That is, the fact that others saw Mr. Gribble as stable, sensible, hardworking, polite and generous made him neither more nor less likely to commit criminal acts of violence in the future. As a result, the jurors were forced to ignore this evidence, since they could not use it in any fashion in answering the second special issue question.

The Court of Criminal Appeals correctly concluded that the Texas special issues (even supplemented as they were) precluded the jury from giving any mitigating weight to the evidence of Mr. Gribble's troubled childhood, chronic mental instability and valuable human qualities, and from expressing its reasoned moral

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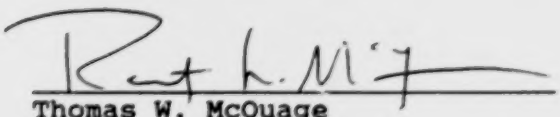
[15] For this reason, the supplemental instruction was of no avail to Mr. Gribble. The additional instruction told the jury to consider the mitigating evidence within the two special issues: the mitigating evidence presented on Mr. Gribble's behalf had only aggravating consequences under special issue two.

response to this evidence in the form of a life sentence. Therefore it was constitutionally necessary to reverse Mr. Gribble's conviction and sentence.

CONCLUSION

For the foregoing reasons this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

the reasonable expectation that death would result." Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); Sutherlin v. State, 682 S.W.2d 546 (Tex. Cr. App. 1984); DeGarmo v. State, 691 S.W.2d 657 (Tex. Cr. App. 1985); and Lane v. State, 743 S.W.2d 617 (Tex. Cr. App. 1987).

The State would submit that the burden of proof has been more than adequately met. Appellant's thirteenth point of error is without merit and should be denied.

REPLY TO POINTS OF ERROR NUMBERS FOURTEEN, FIFTEEN, SIXTEEN, SEVENTEEN, AND EIGHTEEN RESTATED

THE DISTRICT COURT CORRECTLY REFUSED TO SUBMIT THE INSTRUCTIONS OR SPECIAL ISSUES REQUESTED BY APPELLANT AS TO MITIGATING EVIDENCE.

Appellant complains that the Court should have submitted to the jury one or more of the four instructions and one special issue which he requested. Here are the instructions and special issue requested by the Appellant:

> I would further specifically request that instructions be given to the following effects:
>
> Number one, "You are instructed that any evidence which, in your opinion, mitigates against the imposition of the death penalty, including any aspect of the Defendant's character, or record, or any mental illness, and to any of the circumstances of the commission if the offense, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the special issues is yes, and in the event such evidence does cause you to have a reasonable doubt, you should answer the issue no," which I believe differs somewhat from the instruction the Court has now giving with regard to mitigating evidence.
>
> I believe the Court, in this charge, has instructed the Jury they may include any evidence with regard to the Defendant's character, or record, or circumstances of the offense that they find--to the extent that evidence causes them to have a reasonable doubt as to a particular issue and that they may then answer that issue no, and I believe that's different from the instruction that I just stated.
>
> I would further request the following additional issues to be given, or instructions.
>
> "An answer of no may be given to any of the special issues if at least ten jurors find that mitigating factors

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against the imposition of the death penalty exist, either in regard to any aspect of the Defendant's character, or record, any mental illness, or in regard to any of the circumstances of the commission of the offense, or if evidence of any such mitigating factors causes at least ten jurors to have a reasonable doubt as to whether the true ansver to the issues is yes."

I would further request the following instruction, "You are instructed you may ansver any of the special issues no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would further request an instruction that, "You are instructed that you may ansver special issue number one no if you find any aspect of the character, or record, or any mental illness, or any of the circumstances of the offense, as factors which mitigate against the imposition of the death penalty."

I would also request an instruction which states, "You are instructed that you may ansver special issue number two no if you find any aspect of the Defendant's character, or record, or any mental illness, or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty."

I would also request an instruction that says something to the effect that, "You are instructed that you may consider evidence of the Defendant's mental illness, if any--"

Well, strike that. Let me--an instruction that would say, "If you find from the evidence of Defendant's mental illness, if any, independent of any relevance that such mental illness has to either of the special issues, that such evidence creates a reasonable doubt as to whether the death penalty is appropriate for this Defendant, due to such mental illness, if any, then you will ansver special issues one--either special issue number one or two no."

I guess I would also incorporate in that same instruction that, "If ten of the jurors would find such evidence of mental illness mitigates against the imposition of the death penalty independent of the relevance of that evidence to the special issues, that they would then, in turn, ansver special issues number one or two--and two, or either one of them no."

And I guess I would also add to that, "Regardless of what they feel like the ansver to those special issues should, in fact, be."

And then in that same light I would request, I guess, a third interrogatory which asks them, "Do you find," or I guess something that--"Do you find, or do you have a reasonable doubt, due to any evidence of Defendant's mental illness, if any, that the death penalty should not be imposed on this Defendant." (Vol.XXVI, pgs.1416-1419).

It is obvious from the arguments made at trial and on appeal that Appellant is attempting to drag the present case into line with the United States Supreme Court's decision in Penry v. Lynaugh,_____ U.S. _____, 109 S.Ct. 2934, 106 L.Ed 2d 256 (1989). The United States would submit that even though Appellant's brief deals only with Penry issues, point of error fourteen, fifteen, and possibly sixteen, do not even give rise to a Penry claim. After Appellant's objections to the jury charge on punishment, the Court submitted the following instruction:

> In making these decisions, you are instructed that you can consider any evidence which, in your opinion, mitigates against an answer of "yes" to each issue, including any aspects of the defendant's character, history, or mental illness, if any, and any of the circumstances of the commission of this offense which you find to be mitigating. And such evidence causes you to have a reasonable doubt as to any issue, you are required to answer that issue "no". (Vol.III, pg.223).

However, since Appellant has only dealt with Penry issues in his brief, the State will counter the arguments presented.

Appellant elicited two types of evidence at trial that could conceivably be termed mitigating. The first type was in the nature of character evidence. This was elicited from a former employer at the guilt/innocence stage (Vol.XX, pg.159), and at the punishment stage from a parade of witnesses ranging from relatives, to acquaintances, to a former teacher. (Vol.XXV, pg.1120 - Vol.XXVI, pg 1289). As Appellant correctly points out, those witnesses generally testified that Appellant was a good worker and a seemingly nice guy. (Appellant's Brief, pgs.59 and 60).

The other type of evidence that Appellant presents as mitigating is testimony from the various relatives referred to above about Appellant's upbringing, and testimony about his mental condition from a psychiatrist (Vol.

XXIII, pgs.719-793), and a psychoanalyst (Vol. XXVI, pgs. 1289-1354).

Appellant argues, of course, that the Supreme Court's decision in Penry, supra, dictates a reversal in the present case. The State urges that Penry (a bare 5-4 majority) should be read narrowly.

The issue in Penry was whether the jury could, within the framework of Article 37.071 of the Code of Criminal Procedure, give a life sentence instead of the death penalty for some reason apart from the yes or no decisions to be made in answering the special issues. Therefore, it is important to realize that there are two aspects to the concept of mitigation when making a Penry analysis:

1. Are the mitigating factors (if any) such that they can be fully taken into consideration in answering the special issues?

2. Are the mitigating factors such that they should be given consideration in sparing the defendant's life even though the rational answer to both special issues is "Yes"?

As this Court recognized in Pierce v. State, 777 S.W.2d 418 (Tex. Crim. App. 1989):

> "The central issue in Penry is whether there was mitigation evidence before the jury that could not be given consideration within the existing framework of the special issues."

Obviously, in Penry the five justice majority in the Supreme Court felt that the mitigating factors fell into the second category listed above. However, the State would contend that mitigating factors in the present case are so different, and so much less compelling than those in Penry, that the case falls into the first category.

First, let's examine the positive mitigating factors in this case. The defense managed to find relatives, acquaintance, former employers, and a former teacher who were willing to testify that the Appellant seemed like a nice enough guy to them and he worked pretty hard. This is a very common strategy during the

punishment phase in a criminal trial. These opinions, like the evidence pertaining to the sole mitigation argument in Franklin v. Lynaugh, 487 U.S. ____, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), related directly to the second special issue and do not appear to have an independent significance. Unfortunately for Appellant, the aggravating factors relating to the second special issue, including evidence of three prior sexual assaults, (Vol.XXIV, pgs 931-971 and 1007-1058), must have seemed stronger to the jury than the character evidence he was able to tender.

The other types of mitigating evidence discussed in Penry were the negative factors. In Penry these were somewhat overwhelming. Penry was a mentally retarded 22 year-old with organic brain damage. This damage could have been caused by trauma at birth or by the severe beatings to the head he suffered at the hands of his mother. His IQ was tested at various times as being in the range of 50 to 63. At a young age he was routinely locked in his room without access to a toilet for long periods of time. At the time of the crime he had a mental age of 6 1/2 and could barely print his name.

Appellant argues that his negative mitigating factors are analogous to those presented in Penry, and, therefore, the jury should have been given an opportunity to give a life sentence over and above answering the special issues. An examination of the record shows that claim to be ludicrous. What negative mitigating factors were offered were such that they could be considered within the framework of the special issues.

At the punishment hearing Appellant had various family members testify about his childhood. Appellant correctly points out that the testimony referred to a strained marriage between his parents, divorce, and living with other relatives at times. (Appellant's Brief, pg.60). Although these facts are not ideal, they

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are certainly not that unusual. They are a long way away from the maltreatment and physical abuse suffered by Penry. The State would submit that these factors can be considered in evaluating the two special issues and do not warrant additional instructions or special issues.

The other negative mitigating evidence came from two expert witnesses called by Appellant. Dr. Seth Silverman, a psychiatrist, testified during guilt/innocence. (Vol.XXIII, pgs.719-793). The doctor interviewed Appellant one time for approximately one hour. (Vol.XXIII, pg.768). Other than that he reviewed some materials provided by the defense and the results of some psychological tests. (Vol.XXIII, pgs. 726 and 727). The gist of the doctor's testimony was in regard to Appellant's intent to murder Elizabeth Jones. He stated that possibly Appellant did not intend to do so. (Vol. XXIII, pg. 757). Although Dr. Silverman had spent almost no time with the Appellant, he opined that he (Appellant) had a "psychotic illness" and had difficulty controlling his impulses. (Vol.XXIII, pg.90).

The State would submit that Dr. Silverman's testimony, if given credence by the jury, (they certainly must not have given much weight to his testimony on intent), would be considered in answering the deliberateness issue in the first special issue. (One of the problems the Supreme Court found in Penry was the trial courts failure to define "deliberate" in the jury charge. It was defined in this case. [Vol.III, pg.223]). If the jury felt that this "psychotic illness" and these uncontrollable impulses negated the deliberateness of the murder, they had the opportunity to answer the first special issue "No." The mitigating factors to which Dr. Silverman testified did not warrant any additional jury charges or special issues.

The final defense witness to testify to negative mitigating circumstances

was Professor William Winslade, a psychoanalyst. (Winslade is referred to on page 61 of Appellant's Brief as a psychiatrist--he is not.) Ironically, one of the first things Winslade had to say was this:

> ...one should be very cautions about believing what psychiatrists, psychologists, and psychoanalysts say about human behavior, because a lot of times people that testify in trial, like this one, sometimes don't know what they are talking about.
>
> Q. Okay. And what about--do you take a particular viewpoint, for instance, to psychiatrist's and psychologist's ability to determine what a person's state of mind was at a particular time?
>
> A. Yes. I, particularly, in that book, try to argue that it is very difficult to know what was going on in a person's mind at a particular moment in time when they were performing an act, often in a very stressful situation. So I revieved a number of cases, murder trials in detail to see it there was really any good evidence that psychiatrists could know, and concluded that there wasn't very good evidence, in many of the cases. (Vol. XXVI, pgs.1292 and 1293).

Winslade testified that he intervieved Appellant over approximately 5 1/2 hours. He hazarded a guess that Appellant had a serious mental illness. However, he candidly stated that he wasn't real confident of that opinion because he hadn't had the opportunity to do a complete evaluation. (Vol.XXVI, pg.1314). A little later he opines:

> A. I think he suffers from severe mental illness related to his sexual behavior, and to his probable depression, but I don't have any evidence of that. (Vol.XXVI, pg.1317).

Finally, Witness Winslade testified to Appellant's I.Q.:

> Q. In regard to his I.Q., W.A.I.S. test that he administered? What were his findings?
>
> A. Do you want me to read it to you? I mean I can read what he says. I didn't evaluate his testing or score. With psychological testing or score. With psychological testing the problem is--
>
> Q. I am asking what his findings are in that regard.

A. I had a verbal I.Q. of 102 and performance I.Q. of 107, whatever that means.

Q. And where did he fall into the various ranges of intelligence?

A. Average range of intelligence. (Vol. XXVI, pg.1336)

Once again the State would argue that this "evidence," whatever it's worth, (the witness himself doesn't seem too sure), could be considered within the framework of the first special issue--no additional instructions or special issues are necessary.

In his brief Appellant argues:

> In Penry v. Lynaugh, supra, the petitioner argued that he was sentenced to death in violation of the 8th amendment because in light of the instructions given to the jury, the jury was unable to fully consider and give effect to the mitigating evidence of his mental retardation and abused background, which he offered as the basis for a sentence less than death. Penry v. Lynaugh, supra, slip op. at 9. On the basis of the record made in this case, the Defendant here adopts precisely that argument. (Appellant's Brief, pg.62)

The State can hardly blame Appellant for seeking to adopt "precisely that argument" that overturned Penry. Unfortunately, his mitigating factors just do not fall into the same category. Penry was mentally retarded and was severely physically abused as a child. Here, Appellant had a less that ideal childhood and may or may not be psychotic, facts that are hardly as compelling as Penry's.

The State would argue that Penry is a narrow decision. The marginal nature of the mitigating factors in the present case do not put it in the same category with Penry. These types of factors fit easily--just as they always have--into the jury's deliberations on the two special issues which were submitted in this case.

Appellant's points of error fourteen, fifteen, sixteen, seventeen, and eighteen are without merit and should be denied.

APPENDIX B

Engrossed

FILE

ENGROSSED

72 91

By: Montford S.B. No. 880

A BILL TO BE ENTITLED

AN ACT

relating to sentencing procedures in capital cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 37.071, Code of Criminal Procedure, is amended to read as follows:

Art. 37.071. PROCEDURE IN CAPITAL CASE. (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's [his] counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues

submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following [three] issues to the jury:

~~(1) [whether--the-conduct-of-the-defendant-that-caused the-death-of-the-deceased-was-committed-deliberately-and--with--the reasonable--expectation--that--the-death-of-the-deceased-or-another would-result;~~

~~[(2)]~~ whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken

~~[(3)--if-raised-by-the-evidence,-whether-the-conduct-of the-defendant-in-killing-the-deceased-was-unreasonable-in--response to-the-provocation,-if-any,-by-the-deceased]~~.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under

Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously[~~,~~] and

[~~(2)~~] it may not answer any issue "no" unless 10 or more jurors agree; and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without the possibility of parole rather than a death sentence be imposed.

(f) The court shall charge the jury that in answering the

issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice [Corrections] for life without the possibility of parole.

~~[(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with regard to the conduct of the defendant in murdering the deceased individual first~~

named in the indictment.

[(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.]

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals [within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals].

SECTION 2. Subsections (b) and (c), Article 44.29, Code of Criminal Procedure, are amended to read as follows:

(b) If the court of appeals or the Court of Criminal Appeals awards a new trial to a [the] defendant other than a defendant convicted of an offense under Section 19.03, Penal Code, only on the basis of an error or errors made in the punishment stage of the trial, the cause shall stand as it would have stood in case the new trial had been granted by the court below, except that the court shall commence the new trial as if a finding of guilt had been returned and proceed to the punishment stage of the trial under Subsection (b), Section 2, Article 37.07, of this code. If the defendant elects, the court shall empanel a jury for the sentencing

stage of the trial in the same manner as a jury is empaneled by the court for other trials before the court. At the new trial, the court shall allow both the state and the defendant to introduce evidence to show the circumstances of the offense and other evidence as permitted by Section 3 of Article 37.07 of this code.

(c) If any court sets aside or invalidates the sentence of a defendant convicted of an offense under Section 19.03, Penal Code, and sentenced to death on the basis of any error affecting punishment only, the court shall not set the conviction aside but rather shall commence a new punishment hearing under Article 37.071 of this code as if a finding of guilt had been returned. The court shall empanel a jury for the sentencing stage of the trial in the same manner as a jury is to be empaneled by the court in other trials before the court for offenses under Section 19.03, Penal Code [~~This section does not apply to convictions under Section 19.03 of the Penal Code. In such cases, the cause shall stand as it would have stood in case the new trial had been granted by the court below~~].

SECTION 3. Article 44.251, Code of Criminal Procedure, is amended to read as follows:

Art. 44.251. REFORMATION OF SENTENCE IN CAPITAL CASE. (a) The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice [Corrections] for life without the possibility of parole if[~~:~~

[~~(4)~~] the court finds that there is insufficient evidence to support an affirmative answer to an issue submitted to the jury under Article 37.071(b) or a negative answer to an issue submitted to a jury under Article 37.071(e) of this code.

(b) The court of criminal appeals shall reform a sentence of death to a sentence of confinement in the institutional division of the Texas Department of Criminal Justice for life without the possibility of parole if:

(1) the court finds reversible error that affects the punishment stage of the trial other than a finding of insufficient evidence under Subsection (a) of this article; and

(2) within 30 [~~45~~] days after the date on which the opinion is handed down, the date the court disposes of a timely request for rehearing, or the date that the United States Supreme Court disposes of a timely filed petition for writ of certiorari, whichever date is later, the prosecuting attorney files a motion requesting that the sentence be reformed to confinement for life without the possibility of parole.

(c) If the court of criminal appeals finds reversible error that affects the punishment stage of the trial only, as described by Subsection (b) of this article, and the prosecuting attorney does not file a motion for reformation of sentence in the period described by that subsection, the defendant shall receive a new sentencing trial in the manner required by Article 44.29(c) of this code.

SECTION 4. Subsection (b), Section 12.31, Penal Code, is amended to read as follows:

(b) Prospective jurors shall be informed that a sentence of life imprisonment <u>without the possibility of parole</u> or death is mandatory on conviction of a capital felony. ~~[A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.]~~

SECTION 5. The change in law made by this Act, except as provided in Section 7 of this Act, applies to sentencing procedures in capital trials that occur on or after the effective date of this Act, whether the trials are for offenses committed before, on, or after the effective date of this Act and whether the procedures are part of the original trial of the offense, an award of a new trial for both the guilt or innocence stage and the punishment stage of the trial, or an award of a new trial only for the punishment stage of the trial.

SECTION 6. Subsection (b), Section 8, Article 42.18, Code of Criminal Procedure, is amended to read as follows:

(b) A prisoner under sentence of death is not eligible for parole. <u>A prisoner under sentence of life under Section 19.03, Penal Code, is not eligible for release on parole.</u> If a prisoner is serving a sentence for the offenses listed in Subdivision (1), Subsection (a), Section 3g, Article 42.12 of this code, or if the judgment contains an affirmative finding under Subdivision (2) of

Subsection (a) of Section 3g of that article, he is not eligible for release on parole until his actual calendar time served, without consideration of good conduct time, equals one-fourth of the maximum sentence or 15 calendar years, whichever is less, but in no event shall he be eligible for release on parole in less than two calendar years. All other prisoners shall be eligible for release on parole when their calendar time served plus good conduct time equals one-fourth of the maximum sentence imposed or 15 years, whichever is less.

SECTION 7. The change in law made by Section 6 of this Act applies for offenses committed after September 1, 1991.

SECTION 8. The importance of this legislation and the crowded condition of the calendars in both houses create an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days in each house be suspended, and this rule is hereby suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

STATE OF TEXAS
Petitioner,

v.

TIMOTHY LANE GRIBBLE
Respondent.

CERTIFICATE OF SERVICE

I, Robert L. McGlasson, a member of the Bar of this Court, hereby certify that all parties required to be served have been served, and that a copy of Mr. Williams' Petition for Writ of Certiorari in the above-captioned case was mailed, first class postage prepaid, to counsel for Petitioner:

Office of the Attorney General
State of Texas
P. O. Box 12548
Austin, Texas 78711-2548

Criminal District Attorney
Galveston County
405 County Courthouse
Galveston, TX 77550

This 3d day of June, 1991.

Robert L. McGlasson